(29,713)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923.

No. 403

HYGRADE PROVISION COMPANY, INC.; E. GREENEBAUM COMPANY, INC., AND GUCKENHEIMER & HESS, INC., APPELLANTS,

vs.

CARL SHERMAN, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, AND JOAB H. BANTON, AS DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 17, 1924

[fol. 1] **DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK**

HYGRADE PROVISION CO., INC., E. GREENBAUM CO. and GUCKENHEIMER & HESS, INC., Complainants,

against

CARL SHERMAN, as Attorney General of the State of New York, and Joab H. Banton, as District Attorney of the County of New York, Defendants

RULE TO SHOW CAUSE—Filed February 14, 1923

Upon the bill of complaint and affidavit of David L. Podell hereto annexed, duly verified the 12th day of January, 1923, let the defendants and each of them appear at a stated term of this court to be composed of Judges in accordance with Section 266, Judicial Code amended (Section 1243 of the United States Compiled Statutes) to be held at the United States Court House in the Old Post Office Building on the 29th day of January, 1923, at 10:30 A. M. of that day or as soon thereafter as counsel can be heard and show cause why an order should not be made herein enjoining and restraining the defendant Carl Sherman, as Attorney General of the State of New York, and Joab H. Banton as District Attorney of the County of New York, from instituting proceedings of any kind for any act done or committed or omitted by the complainants, its officers and agents, and why the complainants should not have such other and further relief as to the court may seem just and equitable.

Service of a copy of this order on the defendants on or before the 19th day of January, 1923, shall be deemed sufficient.

Dated New York, January 17, 1923.

Jno. C. Knox, U. S. D. J.

[fol. 2] STATE of NEW YORK,
County of New York,
City of New York, ss:

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF DAVID L. PODELL

David L. Podell being duly sworn, deposes and says that he is an attorney-at-law and represents the complainants in the above entitled action. That he has had under consideration Chapters 580 and 581 of the Laws of 1922 of the State of New York which require the labeling of meat products as kosher or nonkosher in a manner more

fully set forth in paragraphs Sixth and Seventh of the bill of complaint annexed hereto. The deponent verily believes that the said enactments are void and unconstitutional in that they deprive the complainants of property without due process of law, in violation of Section 1, Article 14 of the Constitution of the United States and deny to the complainants the equal protection of the law, in violation of Section 1, Article 14 of the Constitution of the United States, and unreasonably interfere with the interstate trade and commerce of the complainants, in violation of Section 8, Article 1 of the Constitution of the United States.

That by reason of the fact that a serious question of constitutional law is involved, it is of the utmost importance and of public concern that this application be speedily heard in order that the rights and interests of the parties may be determined. No previous application has been made for this rule to show cause in this suit.

Wherefore, a rule to show cause is sought returnable within 14 days.

David L. Podell.

Sworn to before me this 12th day of January, 1923. Benjamin S. Kirsh. Benjamin S. Kirsh, Notary Public New York County, No. 416. Reg. No. 4377. Commission expires March 30th, 1924.

[fol. 3] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

BILL OF COMPLAINT

To the honorable judges of the District Court of the United States for the Southern District of New York:

Hygrade Provision Co. Inc., E. Greenebaum Co., Inc., and Guckenheimer & Hess, Inc., of the State of New York, bring this, their bill of complaint against Carl Sherman, as Attorney General of the State of New York, and Joab H. Banton, as District Attorney of the County of New York, in the State of New York, and thereupon your orators complain and say:

First. That your orators are corporations organized under the laws of the State of New York and that the defendants herein, Carl Sherman and Joab H. Banton are residents and citizens of the State of New York. That the amount in dispute herein exceeds, exclusive of interest and cost, the sum or value of Three thousand ($3,000) Dollars.

Second. Your orators further say that they have conducted a [fol. 4] general provision supply business which embraces the pur-

chase and sale of various meat commodities, both raw and prepared, which to your orators' honest belief are Kosher, and have conducted said business ever since said date and are now conducting the same. That said commodities, both raw and prepared, have been sold and shipped by your orators to, into and through the several states in the union, as well as in the State of New York.

Third. Your orators further show that for many years last past they have invested large amounts of money in building up and thoroughly establishing a large and lucrative trade among said dealers and retailers in the said meat commodities, and at present there are many hundreds of such dealers within said state who are buying, carrying in stock, and selling to the public, the said meat commodities prepared and sold by your orators as aforesaid. Your orators' gross annual sales amount to many millions of dollars.

Fourth. Your orators' plants, wherein such meats are prepared are under constant and continuous government inspection and supervision. That all of the meat, whether raw or prepared, is inspected and examined by duly authorized agents of the Department of Agriculture of the Government of the United States from the time it reaches the premises of your orators until it leaves said premises for delivery pursuant to sale or otherwise. Your orators sell, deliver and ship only such meat, articles or commodities for human consumption as are approved under the laws and regulations of the Department of Agriculture as being clean, pure, wholesome and fit for [fol. 5] human food. That any meat or meat commodity, whether raw or prepared, which does not pass a rigid inspection, and which does not receive proper approval under government supervision, is not sold for human food, and your orators therefore say that all of the meats, raw or prepared, which your orators have shipped and continue to ship are pure, clean, wholesome, and proper food eminently fit and desirable for human consumption.

Fifth. That such meat commodities have come to be used very extensively by the public and the good name, good will and trade thus established is of very great value to your orators. That the large bulk of the meat sold and shipped by your orators is wrapped in separate parcels, boxes and barrels bearing the name of your orator inscribed thereon, and your orators have thereby become well and favorably known to the trade and to their customers as producing a desirable wholesome commodity, properly inspected and approved under government supervision, and entirely fit and desirable for human consumption.

Sixth. Your orators further show: That the Legislature of the State of New York at its 1915 session adopted an Act, known as Subdivision 4 of Sec. 435 of the Penal Law, which was duly approved and went into effect on the 1st day of September, 1915, which law provided as follows:

"A person, who, with intent to defraud: Sells or exposes for sale any meat or meat preparations, and falsely represents the same to be

kosher, or as having been prepared under and of a product or [fol. 6] products sanctioned by the orthodox Hebrew religious requirements; or falsely represents any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon the word 'kosher' in any language, is guilty of a misdemeanor."

Seventh. Your orators further say: That the Legislature of the State of New York, at its 1922 session, passed an Act "to amend the Penal Law in relation to the sale and offering for sale of kosher meat or meat preparations," which Act was approved April 11th, 1922 and became Chapter 580 of the Laws of 1922 of the State of New York. That said Act provides:

"Section 1. The penal law is hereby amended by inserting therein a new section, to follow section four hundred and thirty-five, to be section four hundred and thirty-five-a, to read as follows:

Sec. 435-a. Sale of kosher meat and meat preparations.—A person, who, with intent to defraud sells or exposes for sale any meat or meat preparations and falsely represents the same to be kosher, whether such meat or meat preparation be raw or prepared for human consumption, or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements; or falsely represents any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon the word 'kosher' in any language; or sells or exposes for sale in the same place of business both kosher and nonkosher meat or meat preparation, either raw or prepared for human consumption, who fails to indicate on his window signs and all display advertising, in block letters at least four inches in height, [fol. 7] 'kosher and non-kosher meat sold here'; or who exposes for sale in any show window or place of business both kosher and nonkosher meat or meat preparations, either raw or prepared for human consumption, who fails to display over each kind of meat or meat preparation so exposed a sign in block letters at least four inches in height reading 'kosher meat,' or 'nonkosher meat,' as the case may be, is guilty of a misdemeanor.

Sec. 2. This Act shall take effect September first, nineteen hundred and twenty-two."

Eighth. Your orators further show: That the Legislature of the State of New York, at its 1922 session, passed an Act to amend the Penal Law in relation to the sale of kosher meat or meat preparations, which Act was approved on April 11th, 1922, and thereupon became Chapter 581 of the Laws of 1922 of the State of New York. That said Act provides:

"Section 1. Subdivision four of section four hundred and thirty-five of the penal law is hereby amended to read as follows:

"4. Sells or exposes for sale any meat or meat preparation and falsely represents the same to be kosher, or as having been prepared under and of a product or products sanctioned by the orthodox

Hebrew religious requirements; or falsely represents any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon the word 'kosher' in any language; or sells or exposes for sale in the same place of business both kosher and nonkosher meat or meat preparations who fails to indicate on his window signs and all display advertising, in block letters at least four inches in height, 'kosher [fol. 8] and nonkosher meat sold here'; or who exposes for sale in any show window or place of business both kosher and nonkosher meat or meat products who fails to display over such meat or meat preparation so exposed a sign in block letters at least four inches in height reading 'kosher meat,' or 'nonkosher meat,' as the case may be.

Sec. 2. This Act shall take effect immediately.

Ninth. And your orators further show: That the phrase "orthodox Hebrew religious requirements," as used in all of the above enactments, is vague, indefinite, uncertain and incapable of correct and common definition.

Tenth. Your orators further show: That the said term "kosher" used in all of said enactments is a word of the Hebrew language, and is likewise vague, indefinite, uncertain and incapable of correct and common definition. That its meaning is essentially based upon the phrase "orthodox Hebrew religious requirements."

Eleventh. And your orators further show: That where used in a strictly Hebrew religious sense, the term "kosher" may be described as clean, fit, proper, according to the orthodox Hebrew religious requirements, and the term "not kosher" may be described as meaning unclean, unfit, and improper according to the orthodox Hebrew religious requirements.

Twelfth. And your orators further show: That among the hundreds of customers within the State of New York to whom your orators have sold and shipped raw and prepared meat commodities are large numbers of dealers and retailers who sell what may be [fol. 9] described, according to their best belief, as kosher and nonkosher meats. That by reason of the confusion and lack of proper definition of the word "kosher," your orators, have, in the past, avoided wherever possible, labeling the merchandise either as "kosher" or "nonkosher," but have been at all times scrupulously careful to sell meats and meat commodities that were pure, clean, and proper food for human consumption. That wherever your orators could possibly determine in advance as to whether any meat commodity in their honest belief might be called "kosher," they have sold the same as "kosher," but not otherwise, and it has been impossible for your orators to determine with any degree of certainty, reasonable or otherwise, as to what is or what is not "kosher." Various commodities have been brought to your orators marked or labeled "kosher." That your orators could not possibly have known the origin or the process through which the said meat had been put to prior to the time that it was brought to the premises of your orators,

and had they known the process through which it had been put, it would be equally difficult, if not impossible, to determine whether the animals from which they were derived were so slaughtered, or whether they were so prepared after slaughtering as to comply with the orthodox Hebrew religious requirements.

Thirteenth. That your orators are advised by their counsel, and therefore aver, that under the amendments above set forth, that all such manufacturers, dealers or retailers who sell both kosher and non-[fol. 10] kosher meat commodities in their premises will be obligated to determine which of said products are kosher and which are not kosher, and likewise will be obligated to label or post a sign in four inch block letters upon all such commodities exposed for sale in the same place of business, identifying such individual packages as kosher or not kosher, which ever the case may be. That all such manufacturers, dealers or retailers who sell both kosher and non-kosher meats or meat products will be required to post a sign upon their windows or show windows or in their display advertising, announcing that both kosher and non-kosher meats are sold in the said premises.

Fourteenth. Your orators are further advised and therefore aver: That the defendant Carl Sherman is the duly elected Attorney General of the State of New York, and the defendant Joab H. Banton is the duly elected District Attorney for the County of New York, and therefore the prosecuting officer for said County, and that the said defendants have threatened to prosecute all complaints against persons or concerns engaged as manufacturers, dealers, retailers, or otherwise in the sale of raw or prepared meat commodities, who are charged with violating the statutes hereinbefore referred to.

Fifteenth. And your orators further show: That by reason of the threats of prosecution, and by reason of the fear inspired by the enactments and by the requirements of the above laws, the complainants and large numbers of complainants' customers when called upon at their peril to determine whether the meats or meat products are kosher or not kosher, and to label the same in accordance with the requirements of the law, have decided and will continue to decide [fol. 11] that all of the products sold by your complainants are not kosher. That such determination or decision on the part of your complainants and of said customers have been and will be entirely induced by the fear that some judge or jury might determine that the Rabinical Law or the customs, traditions, and precedents of the orthodox Hebrew religious requirements necessitate that even such meats as your orators sell as kosher are not kosher. That as your orators have fully set forth above any such meats or meat products as are sold and shipped from your orators' premises with the label "Kosher" thereon, are according to the best information and belief of your orators prepared in strict accordance with what your orators honestly believe to be the orthodox Hebrew religious requirements, in so far as it is humanly possible for your orator to determine what such requirements are. In any event, your orators allege that all

of the meats sold and shipped from your orators' place of business are clean, wholesome, proper food commodities carefully inspected and eminently fit and desirable for human consumption.

Sixteenth. Your orators further show: That the labeling of any meats produced by your orators as not kosher is an unjust, unwarranted and unreasonable slander upon the property of your orators.

Seventeenth. Your orators further show: That by reason thereof they will be irreparably damaged in serious loss, destruction, and interference with their trade and good will, and with their name and [fol. 12] business reputation. That they will likewise be irreparably damaged in the deprivation and loss of numbers of their customers. That the sales and shipments made by your orators to, into, and through States other than the State of New York will thereby be substantially lessened and decreased. That their good will will, in course of time, be destroyed. That their investment of hundreds of thousands of dollars in their plant and in their equipment and their other property, real and personal, of the kind utilized in the conduct of their business will be substantially diminished in value, if not rendered of no value at all.

Eighteenth. Your orators allege that they sell and ship into states other than the State of New York from the State of New York more than $2,500,000.00 worth of meat and delicatessen supplies every year, That the sales made by your orators are made to dealers, retailers and other consumers and are resold by said dealers, retailers and consumers in the said States other than the State of New York in their original unbroken packages.

Nineteenth. And your orators further show: That unless restrained and enjoined by the order of this Court, said defendants in their efforts to enforce the foregoing enactments will continue to threaten prosecutions of all those who do not comply with the foregoing requirements, and will thereby intimidate and annoy your orators and numerous persons engaged in selling the meats and meat products of your orators, and that their course will be followed by other prosecuting attorneys within the State of New York, and will [fol. 13] likewise threaten and procure prosecutions of the persons selling the merchandise of your orators, and the inevitable effect thereof will be to interfere and obstruct your orators in the conduct of their business, causing them great financial loss, interfering with their property rights in said meats and meat preparations, and with their right to vend the same freely, and will thereby inflict great and irreparable injury upon your orators which it will be impossible to compensate in damages or accurately to ascertain, and for which there is no adequate legal remedy. That many of the persons engaged in the sale of your orators' said meats and meat products have already discontinued their purchases and sales of said meats and meat preparations because of the fear of criminal prosecution induced by the threats of said defendants as aforesaid, and that large numbers of those who are not handling said meats and meat preparations, and

are not yet buying and selling same, will be hereafter induced by said threats to discontinue the sale thereon, unless the defendants are restrained as aforesaid from threatening such prosecutions, and from all other acts calculated to induce your orators' said customers to believe that by purchasing and selling said meats or meat preparations from your orators without such labels or notices, or by erroneously labeling the same they expose themselves to such threatened prosecution.

Twentieth. And your orators further show: That said statutes deprive your orators of their right to vend and sell their products within the State of New York and other States without due process [fol. 14] of law, and is violation of said Section 1, Article 14 of the Constitution of the United States.

Twenty-first. And your orators further aver: Said acts of the Legislature of the State of New York, fully above set forth, are void because contrary to and in violation of so much of Section 1, Article 14 of the Constitution of the United States as provides that no State shall deny to any person within its jurisdiction the equal protection of the law.

Twenty-second. And your orators further show: That said enactments fully above set forth are also in violation of so much of Section 8 of Article 1 of the Constitution of the United States as confers upon the Congress of the United States the power to "regulate commerce with foreign nations and among the several states and with the Indian tribes," and in that said act and each of said sections will, if enforced, unreasonably and arbitrarily interfere with commerce between the several states, and will as heretofore alleged, interrupt and destroy the interstate commerce in which your complainants are largely engaged as aforesaid.

Now, therefore, the premises being considered, may it please the court to grant unto your orators a writ of subpœna commanding the defendants at a day therein to be inserted, to be and appear before this Honorable Court, there to answer without oath (their oats being hereby expressly waived), all and singular of the premises, [fol. 15] and to do and abide by such order and decree as this Honorable Court shall make therein; and until a final hearing of said cause, for as much as by reason of the premises the defendants will, unless restrained by order of this Court, take such action in the premises as will greatly injure and destroy the rights of your orators before a final hearing can be had upon the merits of this cause: and your orators further pray that your Honors will, pending said final hearing, grant a temporary injunction after proper notice of a hearing of this application for a temporary injunction at such time as your Honors shall designate, restraining and forbidding the defendants, their agents, assistants, and attorneys from taking any action in the premises or from instituting any proceeding against your orators, their employees, agents, or representatives, their customers or any one dealing with or selling the said meats or meat

products for any alleged failure to comply with the requirements of said enactments, and enjoining and prohibiting the said defendants, during the pendency of this suit and until the final hearing and determination thereof, from making any threats of prosecuting or from conducting any prosecutions of any and all persons by reason of their failure to label any of the meats sold by your complainants as "not kosher," or by reason of their failure to exhibit a four inch block letter sign or any sign upon the meats or meat products sold by your complainants *h*earing the words "not kosher," or from in any manner interfering or seeking to prevent the full, free, and unhampered sale of the products of your orators within the State of New York without labeling or designating the same as "not [fol. 16] kosher," and from injuring the business of your complainants by compelling it to be discredited in standing and reputation, and by having its merchandise wrongfully branded as "nonkosher," in accordance with the requirements of said enactments.

And will your Honors grant unto your orators all such further relief as may be just and equitable in the premises.

David L. Podell, Solicitor for Complainants.

[fol. 17] Jurat showing the foregoing was duly sworn to by I. G. Abramson, Samuel Slather and E. Greenbaum omitted in printing.

[fol. 18] [File endorsement omitted.]

[fol. 19] District Court of the United States

[Title omitted]

Notice of Motion—Filed Feb. 14, 1923

Sirs: Please take notice that the motion to dismiss the bill of complaint herein has this day been filed in the District Court of the United States for the Southern District of New York, in the office of the Clerk of the said Court, and that the said motion will be set down for hearing and brought on for argument at a term of the said Court, constituted pursuant to §266 of the Judicial Code, to be held at the Old Post Office in the City and County of New York, Southern District of New York, on the 19th day of February, 1923, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Dated: New York, February 13, 1923.

Yours, etc., Carl Sherman, Attorney General of the State of New York. Samuel H. Hofstadter, Solicitor for Defendant Carl Sherman, as Attorney General of the State of New York, 60 Wall Street, New York City.

To Podell, Ansorge & Podell, Esqrs., Solicitors for Complainant, 233 Broadway, New York City.

[fol. 20] DISTRICT COURT OF THE UNITED STATES

[Title omitted]

MOTION TO DISMISS BILL OF COMPLAINT

Now comes the defendant, Carl Sherman as Attorney General of the State of New York, and upon the bill of complaint herein moves that the said bill of complaint be dismissed for the following reasons and upon the following grounds, to wit:

I. That it appears upon the face of the bill of complaint that the facts stated therein are insufficient to constitute a cause of action in equity.

II. That it appears upon the face of the bill of complaint that the complainant has a plain, adequate and complete remedy at law.

III. That it does not appear upon the face of the bill of complaint, and no sufficient facts are averred therein to show, that the intervention of a court of equity and the assumption of jurisdiction by such a court is necessary or essential in order to effectually protect the property or rights of property of the complainant from great and irreparable injury or from any injury whatsoever.

[fol. 21] IV. That Chapter 233 of the Laws of 1915, as amended by Chapter 581 of the New York Laws of 1922 (Penal Law, §435, subd. 4) is a valid statute, duly passed by the Legislature of the State of New York, in the due exercise of its lawful and constitutional powers and does not violate any of the provisions of either Article 1, §8 of the Constitution of the United States or the Fourteenth Amendment to such Constitution; and it does not appear from the face of the bill of complaint or from the facts averred therein that the said statute, or the enforcement thereof by the State of New York by and through its governmental and administrative agencies, operates or will operate or deprive or deny the complainant of the equal protection of the laws, or to deprive him of liberty or of any property or rights of property without due process of law.

V. That Chapter 580 of the New York Laws of 1922 (Penal Law, §435-a) is a valid statute, duly passed by the Legislature of the State of New York, in the due exercise of its lawful and constitutional powers and does not violate any of the provisions of either Article I, §8 of the Constitution of the United States or the Fourteenth Amendment to such Constitution; and it does not appear from the face of the bill of complaint or from the facts averred therein that the said statute, or the enforcement thereof by the State of New York by and through the governmental and administrative agencies, operates or will operate to deprive or deny the complainant of the equal protection of the laws, or to deprive him of liberty or of any property or rights of property without due process of law.

[fol. 22] VI. That it appears upon the face of the bill of complaint that to grant the relief sought by the complainant would constitute an unlawful and unconstitutional interference by the agencies of the Government of the United States with the lawful and constitutional power, right and duty of the State of New York and its governmental agencies (including the Attorney General of the State of New York) to prosecute violations of criminal statutes of the State of New York.

VII. That it appears on the face of the bill of complaint that the complainant is not within the class of persons who are or may be injured by the alleged unconstitutionality of the provisions of the statutes set forth in the bill of complaint.

VIII. That it appears upon the face of the bill of complaint that this court is without power or authority to grant the relief or to render the judgment and decree prayed for.

IX. That no sufficient facts are alleged in the bill of complaint to warrant or justify the granting of the relief prayed for or any other equitable relief.

Wherefore, for the reasons and upon the grounds aforesaid, the defendant, Carl Sherman, as Attorney General of the State of New York, respectfully moves this Court that the bill of complaint herein be dismissed as to him.

Dated: New York, February 8th, 1923.

Carl Sherman, Attorney General of the State of New York.
Samuel H. Hofstadter, Solicitor for Defendant Carl Sherman, as Attorney General of the State of New York, 60 Wall Street, New York City.

[fol. 23] [File endorsement omitted.]

[fol. 24] UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION—Filed March 26, 1923

SIRS: Please take notice that the annexed motion to dismiss the bill of complaint herein has this day been filed in the District Court of the United States for the Southern District of New York, in the office of the Clerk of the said Court, and that the said motion will be set down for hearing and brought on for argument at a term of the said Court, constituted pursuant to §266 of the Judicial Code, to be held at the Old Post Office in the City and County of New York, Southern District of New York, on the 19th day of February 1923,

at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Dated: New York, February 14, 1923.

Yours, etc., Joab H. Banton, District Attorney in and for the County of New York. John Caldwell Myers, Solicitor for Defendant Joab H. Banton.

To Messrs. Podell, Ansorge & Podell, Solicitors for Complainants, 233 Broadway, New York, N. Y.

[fol. 25] UNITED STATES DISTRICT COURT

[Title omitted]

MOTION TO DISMISS BILL OF COMPLAINT

Now comes the defendant, Joab H. Banton, as District Attorney of the County of New York, and upon the bill of complaint herein moves that the said bill of complaint be dismissed for the following reasons and upon the following grounds, to wit:

1. That it appears upon the face of the bill of complaint that the facts stated therein are insufficient to constitute a cause of action in equity.

2. That it appears upon the face of the bill of complaint that the complainant has a plain, adequate and complete remedy at law.

3. That it does not appear upon the face of the bill of complaint, and no sufficient facts are averred therein to show, that the intervention of a court of equity and the assumption of jurisdiction by such a court is necessary or essential in order to effectually protect the property or rights of property of the co plainant from great and irreparable injury or from any injury whatsoever.

[fol. 26] 4. That it appears on the face of the bill of complaint that the complainants are not within the class of persons who are or may be injured by the alleged unconstitutionality of the provisions of the statutes set forth in the bill of complaint.

5. That Chapter 233 of the Laws of 1915, as amended by Chapter 581 of the New York Laws of 1922 (Penal Law, §435, subd. 4) is a valid statute, duly passed by the Legislature of the State of New York, in the due exercise of its lawful and constitutional powers and does not violate any of the provisions of either Article I, §8 of the Constitution of the United States or the Fourteenth Amendment to such Constitution; and it does not appear upon the face of the bill of complaint or from the facts averred therein that the said statute, or the enforcement thereof by the State of New York by and through its governmental and administrative agencies, operates or will operate

to interfere unwarrantably with commerce between the several states, or to deprive or deny the complainants of the equal protection of the laws, or to deprive them of liberty or of any property or rights of property without due process of law.

6. That Chapter 580 of the New York Laws of 1922 (Penal Law §435-a) is a valid statute, duly passed by the Legislature of the State of New York, in the due exercise of its lawful and constitutional powers and does not violate any of the provisions of either Article I, §8 of the Constitution of the United States or the Fourteenth Amendment to such Constitution; and it does not appear upon the face of the bill of complaint or from the facts averred therein that the said statute, or the enforcement thereof by the State of New York by and through the governmental and administrative agencies, operates or will operate to interfere unwarrantably with commerce between the [fol. 27] several states, or to deprive or deny the complainants of the equal protection of the laws, or to deprive them of liberty or of any property or rights of property without due process of law.

7. That it appears upon the face of the bill of complaint that to grant the relief sought by the complainants would constitute an unlawful and unconstitutional interference by the agencies of the Government of the United States with the lawful and constitutional power, right and duty of the State of New York and its governmental agencies (including the District Attorney of the County of New York) to prosecute violations of criminal statutes of the State of New York.

8. That it appears upon the face of the bill of complaint that this court is without power or authority to grant the relief or to render the judgment and decree prayed for.

9. That no sufficient facts are alleged in the bill of complaint to warrant or justify the granting of the relief prayed for or any other equitable relief.

Wherefore, for the reasons and upon the grounds aforesaid, the defendant, Joab H. Banton, as District Attorney of the County of New York, respectfully moves this Court that the bill of complaint herein be dismissed as to him.

Dated: February 14, 1923.

Joab H. Banton, District Attorney of the County of New York. John Caldwell Myers, Solicitor for Defendant Joab H. Banton, as District Attorney of the County of New York, 32 Franklin Street, New York, N. Y.

[fol. 28] [File endorsement omitted.]

[fol. 29] STATE OF NEW YORK,
County of New York, ss:

DISTRICT COURT OF THE UNITED STATES

[Title omitted]

AFFIDAVIT OF DAVID L. PODELL—Filed Feb. 24, 1923

David L. Podell, being duly sworn, deposes and says:

I am an attorney at law and represent the complainants in the above entitled actions.

The annexed statement in question and answer form is taken from the record on appeal in the case of People v. Atlas, a prosecution conducted in the State Court under the unamended section 435, subdiv. 4, which involves the Kosher Laws.

[fol. 30] That the testimony of said Rev. Dr. Bernard Drachman as the same appears therein was read into said record by the consent of both sides from the case of People v. Goldberger. That in the last mentioned case, the said Rev. Dr. Bernard Drachman, as I am advised and verily believe, appeared personally as a witness under oath or affirmation and gave the annexed testimony.

(Sgd.) David L. Podell.

Sworn to before me this 16th day of February, 1923. (Sgd.) Abraham Greenberg, Notary Public, Kings County. Kings Co. Cl'k's No. 239. Reg. No. 4278. N. Y. Co. Cl'k's No. 696. Reg. No. 4021. Term expires March 30, 1924.

[fol. 31] EXHIBIT TO PODELL'S AFFIDAVIT

Testimony of Rev. Bernard Drachman, D. D., in case of People v. Goldberger, Used by Stipulation in Case of People v. Atlas

By Mr. Wahle:

Q. In the book of Leviticus there is found what we believe Moses told us, as to what is clean and what is unclean, with relation to fitness for eating?

A. Yes.

Q. In the book of Leviticus there is listed a certain class of animals which it is permitted the Orthodox Hebrew to eat and certain animals of which he is forbidden to partake?

A. Yes.

Q. These animals of which the Jew is forbidden to partake of according to the law of Moses are animals that are not clean?

A. Not kosher, yes, sir.

Q. The word kosher itself means clean?

A. No, sir.

Q. It does not mean clean?
A. It is technically incorrect.
Q. Is it equivocally correct?
A. I would have to define what the word kosher means.
Q. There is found in the Old Testament at various places a list of animals of which the Jew may not partake of as food?
A. Yes, sir.
Q. There is found a direction as to how animals shall be slaughtered?
A. It is not found directly in the Bible.
Q. Is there an intimation?
A. There is a passage in which there is a traditional interpretation of ritual slaughtering.
[fol. 32] Q. Are there in the Old Testament passages that define how slaughtered food, which would otherwise be kosher, is to be treated?
A. It is not stated.
Q. It is stated how blood shall be drawn from the meat?
A. Yes, sir, it is found in the Bible.
(Witness continued:) Based upon these directions in the Old Testament, there has developed an oral interpretation and a written interpretation of what these passages in the Bible mean. In addition to the written law as contained in the Bible, there is an oral law or tradition which is taught by the Jewish authorities to have been handed down from generation to generation.
Q. Are these oral law or traditions to which you refer in the form of commentaries?
A. In the talmud, and Mishnab, Sifra and Sifrey. There are questions and answers. The cases were raised constantly from time to time in the course of history and these were submitted to the Rabbis or interpretors of the Jewish law. These are rules that regulate the religious Jewish life. They are called technically the responses of the Rabbis. There is a great rabbinnical literature, which contains the decisions and explanations of all the Jewish ecclesiastical authorities. A Rabbi in deciding a question will be guided by all of these statements as far back as the Bible. In the talmud we have 2 great rabbinnical codes known as the Schulcan Aruch and (—), is the great code or corpus juris, of the Jewish Theological Law, cannon law. In addition to this there are all these Responsa; a great part of the literature in which these questions are treated.

[fol. 33] By Mr. Wahle:

Q. How large doctor is the bibliography in reference to this question of kosher?
A. Several thousand great volumes.
Q. What part of it is in the form of commentary?
A. Commentary and interpretation of the Bible and talmud.
Q. Give us the definition of what is meant by the talmud?
A. As I said before, along with the written law or the Bible there is an oral law. This oral law for many centuries was ma-ntained

purely by word of mouth as an oral law. It was not written, it was strictly traditional. The Gemara was written about the third or fourth century of the Christian Era. Then there were the two talmuds, the Babylonian and Palestinian talmud, these two works together form what we call the talmud, and which is now the Jewish Law. The talmud is not all of the Jewish Law.

Q. Can you tell us whether it is accepted or whether there has been any determination except by the religious Hebrew, whether this law of what is kosher and what not kosher was originally a health law or a religious law?

A. Subjective interpretation or thorough interpretation of that that we do not know today, and that is a question of obedience. In our Bible and in our talmud are contained certain defined commandments and the interpretation of them by spiritual authorities. The duties of the Jew is to obey these commandments without question. Some intelligent men will say that it is a health *Jew*. The teachings are to train the will to obedience to the law. When a Jew is not permitted to eat certain kinds of food and that prohibition accompanies him all of his life he controls his will, and it keeps him [fol. 34] under moral control. These are the interpretations as far as the law i*n* concerned, these questions are of no moment; the one of obedience is the one that tradition gives us.

By District Attorney:

Q. Let us assume that there is a butcher shop in the City of New York, with the sign kosher in front of the shop, that there is meat in that shop that is not koshered, and that chickens that are slaughtered according to the ritualistic method are brought into the butcher shop. In your opinion if these chickens were kept in the same shop, in the same place, in the same vessels and utensils, and handled in the same way as the meat not kosher would those chickens be kosher?

I object to the same vessels and utensils.

District Attorney: I will withdraw utensils and vessels and substitute in the same shop and in the same ice box.

A. This state of affairs would be one that rabinnical authority would distinctly disapprove of. We do not approve of having in the one place things that are permitted and things that are not permitted. Especially, inasmuch as it was a regular state of affairs. We consider it a very great sin to mislead anyone either directly or indirectly. A condition might be partly correct and partly false and not a direct falsehood, but the impression might be created that is misleading, and a disobedience of our law and sinful as such. If a religious Jew happens to have a forbidden article of food, trafe, which he cannot conscientiously use, he may dispose of it to people who can dispose of it and use it. If he buys a mass of material, he [fol. 35] may dispose of the forbidden things, because they have come casually into his possession. It is a duty of the Rabbi to adopt

such rules and regulations, when individual cases come up, according to the particular state of facts.

Mr. Wahle: I move to strike from the record Dr. Strachman's testimony in regard to chickens——(Interrupted.)

By District Attorney:

Q. As I understand your answer to Judge Wahle, you said there were certain requirements of the Hebrew faith, which provided that food products be safeguarded and secured in a particular way and that if they were not so safeguarded and so protected, that it would be considered constructively trafe, not kosher?

A. The religious Jew would not use it.

Q. You did say that the religion provided that Jewish people should be protected from certain impositions, and that if the meat in that store were sold with the chickens that they would become trafe and not kosher.

A. Yes sir.

Q. You gave your conclusion as to whether or not under the circumstances outlined and conditions presented to you, that the meat was not kosher. I would like to hear from you just exactly what your opinion is?

Objected to, as immaterial and incompetent.
Sustained.

District Attorney: It is conceded that this witness is an expert.

[fol. 36] By Justice Edwards:

Q. Part of the learning of your order is to know what constitutes kosher meat. The meat that is ritually fit such as a Jew may lawfully eat?

A. The individual Jew will only eat meat which has come from the permitted animal, and which has received the proper treatment which the Jewish law requires.

By Mr. Wahle:

Q. There are certain animals which are absolutely forbidden and which can never be kosher, and there are certain animals which may or may not be kosher?

A. Yes.

By Justice Edwards:

Q. There are certain permitted animals that may not be kosher?
A. Yes sir.
Q. Those are physical elements?
A. Yes sir.

By Justice Herbert:

Q. Is it possible that meat killed in the ordinary way, may become kosher?
A. No sir.
Q. Assuming that it was killed or slaughtered in a manner unknown, that they came into the store at 6 o'clock in the morning and it was not labelled kosher?
A. In the matter of the animal being slaughtered in a manner unknown that is quite out of the question. Kosher meat is marked, stamped or sealed.
Q. If meat is from a permitted, or rather from an animal not permitted, nothing could be done to make it kosher?
A. No sir.

[fol. 37] By Mr. Wahle:

Q. If the animal had been slaughtered with a sharp knife, properly shaped and the parts perfectly clean——(interrupted).

By District Attorney:

Q. If meat that was kosher was placed in actual contact with meat that was not kosher, what would be the effect?
A. It would be a rabbinnical decision? Such conditions would not be permitted to exist by rabbinnical authorities.
Q. You said something about misrepresentations being forbidden by rabbinnical law?
A. We are here to demonstrate our law. The Jewish Law is not a foreign law, it is a great definite part of our ordinary law.

Mr. Wahle: Any law except the law of the State of New York is a foreign law.

Q. There are certain provisions of the Jewish law, that outline how a jew shall conduct himself?
A. Yes sir.

Justice Herbert:

Q. I show you People's Exhibit One, and I ask you to read the whole sign including the English and Hebrew characters?
A. A. H. Goldberger, Kosher Meat and Poultry Market.
Q. Tell us what part of speech the word there is kosher?
—. It is an adjective qualifying the words meat and poultry market.

[fol. 38] By Justice Freschi:

Q. Is kosher also used as a noun?
A. It is an adjective always. There is another word which is almost the same in pronunciation meaning fitness. Kosher is an adjective meaning fit or proper and the word fit or proper according to the requirements of the Jewish Law. When a Jew says that he

understands it to mean that the thing is for sale, it refers to it being fit and proper according to the Jewish Law.

By Justice Herbert:

Q. Is there any other use of the word kosher except as an adjective?
A. No sir, not to my knowledge?

Mr. Wahle: In the standard dictionary, the definition is, or rather the word is defined as an adjective (Heb.). Permitted by or fulfilling the requirements of the law; clean; pure, said usually of food.
Q. Do you agree with that translation?
A. Essentially. Of course the standard dictionary is using it as people use it. I have gone to the bottom of it in the Hebrew language and the word kosher means fit and proper.

The Court: Nothing remains to complete your record but to take testimony as to the presence or absence of the letters on the bone, or the condition of the leaden seal.

[fol. 39] [File endorsement omitted.]

[fol. 40] UNITED STATES DISTRICT COURT

[Title omitted]

Affidavits in Opposition to Motion for Temporary Injunction— Filed February 24, 1923

[fol. 41] [Index omitted]

[fol. 42] UNITED STATES OF AMERICA,
Southern District of New York,
City, State and County of New York, ss:

[Title omitted]

AFFIDAVIT OF MOSES HYAMSON

Moses Hyamson, being duly sworn, deposes and says: That he is [fol. 43] Rabbi of Congregation Orach Chaim (Path of Life) of the City of New York; Member of the Faculty and Professor of Codes of the Jewish Theological Seminary of America; that formerly he was the Senior Dayan (Judge of the Ecclesiastical and Arbitration Court of London, England) for eleven years (1900-1911), and Acting Chief Rabbi of the United Hebrew Congregations of the British Empire for two years (1911-1913); and that he is the author of the English Edition of the Collatio Mosaicarum et Romanarum Legum

and of "The Oral Law," and holds the degree of LL. D., of London University, England.

That in the exercise of his duties as Dayan and subsequently as Acting Chief Rabbi of the British Empire, he was in chief control of and exercised supervision over the preparation and sale of kosher meat in London primarily and also in the British Isles. That he is fully familiar with the theory and practice pertaining to the Jewish ritual requirements as to the preparation of kosher meat.

That the term kosher is a perfectly clear and definite one in Jewish usage; that the law pertaining to the subject of kosher meat and products is set forth in the Rabbinical Code known as the Shulchan Aruch and specifically in that division of the Code known as the Yoreh Déáh. That the Schulchan Aruch dates back to the sixteenth century and has been accepted as binding from the time of its compilation and is so accepted at the present day by Orthodox Jews all over the world. The said Code was based on the previous compilations and codes dating back to the Talmud, the final redaction of which occurred in the sixth century.

Kosher meat is defined as the flesh of such beasts and fowl as are permitted by the Mosaic Law to be eaten by Jews (see Leviticus, [fol. 44] Chapter 11, and summary parallel in the book of Deuteronomy, Chapter 14, verses 3 to 21), slaughtered in accordance with the traditional rules and practice as set forth in the division of the Schulchan Oruch Code designated Yoreh Déáh.

The rules for slaughtering as set forth in the said Code may be briefly summarized as follows:

The ritual slaughterer known as a Schochet must be a person of the Jewish faith, of good character and possessed of the requisite knowledge and practical training as attested by a Jewish rabbi.

The mode of killing is an incision in the neck, severing the œsophagus and trachea. The knife is of more than surgical sharpness and smoothness, with a perfect edge, without the least perceptible unevenness, identation or roughness. It is passed forward and backward over the operator's finger—flesh and nail—twelve times to test its sharpness and smoothness—over the flesh, because the œsophagus is fleshy like the finger; over the nail because the trachea is cartilaginous and hard like the nail. If any unevenness is felt the knife has to be smoothed on the hone and again tested before being used. So much importance is attached to smoothness of the knife that it is examined once more after killing; and if any unevenness, roughness or the minutest indentation is found the beast is regarded as having been improperly slaughtered, and its flesh is Nebelah and may not be consumed by Jews. The knife must be more than twice as long as the breadth of the neck of the animal—for large cattle, fourteen finger-breadths. Hence Schochetim have three different knives, one for birds, [fol. 45] one for large cattle, one for small cattle. The mode of killing cuts the trachea, æsophagus, carotid arteries and jugular veins with one continuous, to and fro movement of an exceedingly sharp and perfectly smooth knife, which has been prepared and tested for absolute freedom from roughness.

Five points have to be observed in correct ritual slaughter:

Shehiya.—There must be no pause. The incision must be continuous until all the vital parts are severed. A pause for an instant, voluntary or involuntary, renders the killing improper. The object is to obviate protracted pain.

Derasa.—There must be no pressing upward or downward, nor any hacking. The object is to secure positive and swift action in the incision.

Chalada.—There must be no burrowing. The knife must not be introduced under the skin, as in stabbing, or covered by the wool of the sheep or hair of the steer. The incision must be free, open and exposed, so as to drain the brain quickly and thus render the animal unconscious immediately.

Hagrama.—The incision must be made in a prescribed region of the neck, namely, through the trachea, preferably below the cricoid,—the complete cartilaginous ring immediately below the larynx,—but not through the larynx, nor through that part of the neck which is close to the chest, where the muscles are very thick and the trachea is deep seated. The reason is that the complete ring is hard, sometimes almost completely ossified, and might blunt or nick the instrument and thus cause delay in cutting and inflict [fol. 46] increased pain. Similarly, the muscles near the chest are thick and stout, and to cut through them would be attended with delay.

Ikkur.—There must not be a laceration, but an incision, a clean cut, not a tear; hence the knife is examined after the operation, as well as before, to make sure that it is perfectly smooth. If a roughness is found the beast is declared to have been improperly killed and its flesh is Trefah. The explanation is evident. It is well known that a tear is infinitely more painful than an incision. The prescribed incision, therefore, must be made by an instrument sufficiently long and broad, exceedingly sharp and perfectly smooth.

The incision should be carried from the surface of the skin down to, but not touching, the vertebræ. This necessity includes the severance of the trachea, œsophagus, carotid arteries, jugular veins, the pneumogastrics and the main or upper cardiac branches of the sympathetic nerves. Severing the carotids causes an immediate acute anæmia of the brain, which is followed instantaneously by unconsciousness.

The purpose of these minute rules is to spare the beast pain. The three precepts of surgery are that an operation should be performed cito, tuto et jucundo—quickly, with certainty and with a minimum of suffering. The prohibition of pausing—the insistence on continuousness in the cut—insures swiftness. The inhibition of pressing insures certainty, and the rule that the incision must be free and open secures quick and sure draining of the brain and prevents suffering.

[fol. 47] After the slaying of the beast, it is examined for lesions of a mortal character, of which the commonest and most usual in-

stance is diseased lungs. Any carcass found to be diseased is pronounced nonkosher or Trefah.

After the animal is found to be properly killed and after examination found to be free from mortal lesions or disease, the Schochet attaches to the various parts of the animal a tag containing the hour, day and week as well as the name of the Schochet and the Rabbi under whose supervision the slaughter and inspection has been conducted. In addition, the Schochet attaches a leaden seal containing the day and week and the word "kosher" to the various parts of the animal. In addition to this the meat itself in various parts of the animal is stamped with the day and week.

On the other hand, meat of an animal which has been improperly killed or found to be diseased, has none of the tags, seals or stamps attached, and in place thereof is designated as Trefah by the placing upon it of a "X" cut out on the bone.

This system is universally in use in this country, in the British Empire, as well as in the whole of Europe and is universally known as the marks distinguishing kosher from Trefah.

As a practical matter, therefore, the butcher who receives meat can have no difficulty whatever in knowing what meat is kosher and what meat is not kosher.

Meat which is not sold by the butcher within three days from the date of its slaughter must be sprinkled by him with water to keep the pores open in order that the meat when placed by the housewife in water and subsequently sprinkled with salt and kept in that condition for a time (all of which is required by the ritual law) may part [fol. 48] with its surface blood which is washed off before cooking.

Meat which has been slaughtered and prepared in the manner hereinbefore immediately outlined is kosher if it is not mixed with butter, milk or non-kosher meat.

The foregoing is a brief but complete summary of the entire law pertaining to kosher meat and meat preparations.

The questions treated in the Responsa literature concern elucidations of details in borderline cases. Moreover, the accepted decisions in the Responsa previous to the compilation of the Schulch Aruch were embodied in that Code.

Deponent respectfully states that the difference between kosher and non-kosher is perfectly clear and universally known and recognized by all Orthodox Jews.

Moses Hyamson.

Notary's certificate omitted.

[fol. 49] STATE OF NEW YORK,
County of New York,
City of New York, ss:

[Title omitted]

AFFIDAVIT OF ELIAS A. COHEN

Elias A. Cohen, being duly sworn, deposes and says: That he is Chairman of the Organization Committee of the Kehillah (Jewish Community) of New York City, a corporation organized under the Laws of the State of New York, the purposes of which said corporation generally are to stimulate and encourage the instruction of the Jews residing in the City of New York in the tenets of their religion and in the history, institutions and traditions of their faith.

That on the 29th day of January, 1923, your deponent presided at a conference of Rabbis representing various rabbinical colleges, synods and organizations, which said conference was called by the said Kehillah (Jewish Community) of the City of New York. That at said conference, the following resolution was unanimously adopted:

[fol. 50] "Resolved, that it is the unanimous sense of all those assembled here, representatives of the various rabbinical colleges and synods who are interested in the question of kosher, that the Law of Kashruth relative to meat or meat preparations is clear, simple and distinct, and that the laws appertaining thereto are easily ascertainable in the Jewish code applying thereto."

That at said conference the following named Rabbis were present and participated in the adoption of the resolution above set forth:

Rabbi Moses Hyamson, 1335 Madison Avenue, Rabbi of Cong. Orach Chaim, Member of Faculty of Jewish Theological Seminary, Senior Dyan (Judge Ecclesiastical and Arbitration Court) for 11 years, 1900-1911, and Acting Chief Rabbi of United Hebrew Congregations of the British Empire 2 years, 1911-1913.

Rabbi Philip Klein, 137 West 119 Street, Rabbi of Cong. Chab Zedek and Member of Association of Orthodox Rabbis.

Rabbi M. S. Margolies, 48 East 89 Street, Rabbi of Cong. Kehillath Jeshurum and Member of Executive Committee of the Union of Orthodox Rabbis of the United States and Canada.

Rabbi S. E. Jaffe, 207 East Broadway, Rabbi of Beth Medrash Hagodal and Member of Executive Committee of Union of Orthodox Rabbis of the United States and Canada.

Rabbi G. Wolf Margolis, 203 East Broadway, Rabbi of United Hebrew Community of New York.

Rabbi Abr. Yudelowitz, 243 East Broadway, Chief Rabbi of Federation of Orthodox Synagogues of America and President of the Jewish Ministers' Association.

[fol. 51] Rabbi Herbert S. Goldstein, 1893 Seventh Avenue, Rabbi of Institutional Synagogue and President of the Union of Orthodox Jewish Congregations of America.

Rabbi Elias L. Solomon, 1326 Madison Avenue, Rabbi of Cong. Shaarei Zedek and President of United Synagogue of America.

Rabbi Jacob Kohn, 235 West 110th Street, Rabbi Temple Ansche Chesed and Member of Executive Council of United Synagogue.

Rabbi B. B. Guth, 103 Avenue A, Rabbi Cong. Ahavath Chesed Ch. S. and Ansche Ungarn and Member of Union of Orthodox Rabbis of United States and Canada.

Rabbi David de Solo Pool, 99 Central Park West, Rabbi Cong. Shearith Israel and Executive Director of Jewish Education Association.

Rabbi A. Gallant, 508 East 140 Street, Rabbi of Cong. Beth Abrohom, President of Association of Orthodox Rabbis of the Bronx and Member of Executive Committee of Union of Orthodox Rabbis of the United States and Canada.

Rabbi S. L. Hurwitz, 66 West 118 Street, Principal Salanter Talmud Torah and Member of Jewish Ministers' Association of Harlem.

Rabbi Bernard Drachman, 128 West 121 Street, Rabbi of Cong. Zichron Ephraim, Hon. President of Union of Orthodox Jewish Congregations of America and President of Jewish Sabbath Alliance of America.

Rabbi Samuel Gerstenfeld, 460 Grand Street, Secretary of Association of Orthodox Rabbis and Member of Faculty of Isaac Elchanan Theological Seminary.

Rabbi A. S. Pfeffer, 112 Avenue C, Rabbi Beth Hamedrash Hagodol and Member of Executive Committee of Union of Orthodox Rabbis of United States and Canada.

[fol. 52] Rabbi B. Z. Pearl, 118 West 112 Street, President of Jewish Ministers' Association of Harlem.

Rabbi Jacob Katz, 945 East 163 Street, Rabbi Montefiore Cong. and Chaplain of Sing Sing Prison.

Rabbi Jacob Tarlau, 461 West 159 Street, Rabbi of People's Synagogue of the Educational Alliance.

Rabbi J. J. Margolin, 204 Henry Street, Rabbi of Cong. Emunath Israel of New York and Cong. Shomrei Shabath Bnei Israel of the Bronx, New York, and Member of Jewish Ministers' Association.

Rabbi E. Inselbuch, 171 Vernon Avenue, Brooklyn, Rabbi Beth Medrash Hagodal and Member of Executive Committee of Union of Orthodox Rabbis of United States and Canada.

Rabbi A. I. Schuchatowitz, 22 West 114 Street, Rabbi Cong. Sons of Israel Kalvarier and Member Jewish Ministers' Association of Harlem.

Rabbi I. L. Epstein, 213 Henry Street, Rabbi Cong. Senier and Wilner and Member of Jewish Ministers' Association.

Rabbi E. Friedman, 146 Lewis Street, Member of Association of Orthodox Rabbis.

Rabbi M. Gorodeisky, 717 Kelly Street, Rabbi Cong. Tomche Torah and Member of the Jewish Ministers' Association.

Rabbi A. D. Burack, 565 Willoughby Avenue, Brooklyn, Rabbi of Cong. Chel Moshe Chevra Thilim and Member of Association of Orthodox Rabbis.

Rabbi Benjamin Aaronwitz, 65 East 121 Street, of Agudath Ha-Rabonim and Isaac Elchanan Theological Seminary.

Rabbi Sigmund Abeles, 450 Monroe Avenue, Brooklyn, Rabbi of Cong. Glory of Judea, and Member of Executive Committee of Union [fol. 53] of Orthodox Rabbis of United States and Canada.

Rabbi M. Buchbinder, 323 Alabama Avenue, Brooklyn, of the Agudath Ha-Rabonim.

Rabbi Louis Klein, 266 East 7 Street, Rabbi of Cong. Shebeth Achim Anshei Slonim.

Rabbi B. Karp, 1284 Southern Boulevard, of Agudath Ha-Rabonim.

Rabbi M. A. Kaplan, 22 East 108 Street, of Agudath Ha-Rabonim and Jewish Ministers' Association of Harlem.

Rabbi J. Levinson, 481 Stone Avenue, Brooklyn of Agudath Ha-Rabonim and Association of Orthodox Rabbis.

Rabbi M. Landau, 433 Grand Street, Rabbi of Adath Hochasidim D'Polen.

Rabbi L. Predmesky, 1467 Washington Avenue, Rabbi Cong. Tremont Hebrew Free School and Union of Orthodox Rabbis of United States and Canada.

Rabbi M. Guizk, 1961-79 Street, Brooklyn, of Agudath Ha-Rabonim and Executive Committee of Orthodox Rabbis of United States and Canada.

Dr. Leo Jung, 41 West 86 Street, of the Society for the Advancement of Judaism.

Rabbi T. Newlander, 954 Leggett Avenue, of the Association of Orthodox Rabbis.

Rabbi L. Plotkin, 509 Elton Street, Brooklyn, of the Agudath Ha-Rabonim.

Rabbi M. Rabinowitz, 28 Montgomery Street, of the Agudath Ha-Rabonim.

Rabbi J. Redelheim, 120 West 112 Street, of the Agudath Ha-Rabonim.

Rabbi Daniel Shapiro, 619 Willoughby Avenue, Brooklyn, of the Association of Orthodox Rabbis.

Rabbi A. Sielenfreund, 325 East 83 Street, Member of Jewish Ministers' Association.

[fol. 54] Rabbi R. Winer, 1589 Washington Avenue, of the Agudath Ha-Rabonim and the Association of Orthodox Rabbis.

Rabbi S. Alishefski, 778 Beck Street, of the Association of Orthodox Rabbis and member of Executive Committee of Orthodox Jewish Congs. of America.

The following Rabbis were also present:

Rabbis Hirsh Dachowitz, 626 Rockaway Avenue, Brooklyn; Israel Dickstein, 304 East Broadway; Joseph Sechtzer, 218 East Houston Street; B. Shapiro, 245 Clinton Street; Elijah M. Finkelstein, 1226 50 Street, Brooklyn; Samuel Hurwitz, 856 East 172 Street, and Israel Hager, 132 Broome Street.

Elias A. Cohen.

Notary's certificate omitted.

[fol. 55] STATE OF NEW YORK,
County of New York,
City of New York, ss:

[Title omitted]

AFFIDAVIT OF BERNARD DRACHMAN

Bernard Drachman, being duly sworn, deposes and says: That he is Rabbi of Congregation Zichron Ephraim and Honorary President [fol. 56] of the Union of Orthodox Jewish Congregations of America.

That the term kosher is a perfectly clear and definite one in Jewish usage; that the questions treated in the Responsa concern only exceptions or border line cases, are in many instances repetitions and constitute only an infinitesimal part of the cases where the law of kosher operates, and that meat and meat products are kosher when prepared in accordance with the dietary laws codified in the Rabbinical Code known as Shulchan Aruch.

Bernard Drachman.

Notary's certificate omitted.

[fol. 57] [Title omitted]

AFFIDAVIT OF HERBERT S. GOLDSTEIN

Herbert S. Goldstein, being duly sworn, deposes and says: That he is Rabbi of the Institutional Synagogue and President of the Union of Orthodox Jewish Congregations of America.

That the term kosher is a perfectly clear and definite one in Jewish usage; that the questions treated in the Responsa concern only exceptional or border line cases, are in many instances repetitious and constitute only an infinitesimal part of the cases where the law of kosher operates, and that meat and meat products are kosher when prepared in accordance with the dietary laws codified in the Rabbinical Code known as Shulchan Aruch.

Herbert S. Goldstein.

Notary's certificate omitted.

[fol. 58] [Title omitted]

AFFIDAVIT OF DR. DE SOLA POOL

Rabbi David De Sola Pool, being duly sworn, deposes and says that he is Rabbi of Congregation Shearith Israel and Executive Director of the Jewish Education Association; that the orthodox Hebrew religious requirement of Kosher in relation to meat and

meat preparations, known as the Law of Kashruth, is clear, simple and distinct, and the laws appertaining thereto are easily ascertainable in the Jewish Code applying thereto.

D. De Sola Pool.

Notary's certificate omitted.

[fol. 59] [Title omitted]

AFFIDAVIT OF PH. KLEIN

Dr. Ph. Klein, being duly sworn, deposes and says that he is Rabbi of Ohab Zedek Cong. and member of the Assn. of Orthodox Rabbis; that the orthodox Hebrew religious requirement of Kosher in relation to meat and meat preparations, known as the Law of Kashruth, is clear, simple and distinct, and the laws appertaining thereto are easily ascertainable in the Jewish Code applying thereto.

Rabbi Dr. Ph. Klein.

Notary's certificate omitted.

[fol. 60] [Title omitted]

AFFIDAVIT OF M. S. MARGOLIES

Rabbi M. S. Margolies, being duly sworn, deposes and says that he is Rabbi of Congregation Kehillath Jeshurum and Member of Ex. Com. Union of Orthodox Rabbis of U. S. and Canada; that the orthodox Hebrew religious requirement of Kosher in relation to meat and meat preparations, known as the law of Kashruth, is clear, simple and distinct, and the laws appertaining thereto are easily ascertainable in the Jewish Code applying thereto.

Rabbi M. S. Margolies.

Notary's certificate omitted.

[fol. 61] [Title omitted]

AFFIDAVIT OF M. S. MARGOLIES

M. S. Margolies, being duly sworn, deposes and says: That he is Senior Rabbi of Congregation Kehillath Jeshurun of the City of New York; Honorary President of the Union of Orthodox Rabbis of the United States and Canada, and a member of the Ritual Commission [fol. 62 & 63] of the Union of Jewish Orthodox Congregations of America. That he is the Chief Supervisor of the Rabbis in charge of the Jewish Ritual Slaughtering Department of the United Dressed

Beef Company, situated at 43rd Street and First Avenue, in the City of New York.

That he has read the affidavit of Moses Hyamson verified the 15th day of February, 1923, and that the statements therein contained as to the Jewish Ritual Law and practice, is true and correct.

As stated in the said affidavit of Moses Hyamson, meat which has been slaughtered in accordance with the Jewish Ritual requirements so as to make the same kosher, has attached thereto a seal and tag as well as markings made on the meat itself.

Exact duplicate specimens of the seal and tag are hereto attached.

M. S. Margolies.

Notary's certificate omitted.

[fol. 64] IN UNITED STATES DISTRICT COURT

[Title omitted]

OPINION

The above cases were argued together and will be considered in one opinion.

The complainants, by their bills in equity, seek to have Chapters 580-581 of the Laws of 1922, also known as Sections 435 and 435a of the Penal Law, declared to be in contravention of the Federal Constitution. The complainants are here contending a right to injunctive relief in equity pursuant to Section 24, sub. div. 1 of the Judicial Code. The contention is that Satz, a delicatessen dealer is obligated under the statute, to label his meats with the signs and notices required by the statute. The Lewis & Fox Company is a foreign corporation, and sells its meat products in original packages in the State of New York. The Hygrade Provision Co. Inc., is a provision manufacturer, having places of business within the City of New York and is under duty to label its meats in accordance with this statute. It sells its products in this and other states.

The allegations of the complaints are, that they each have invested large amounts of money, have established an extensive business and valuable good will and, that they are selling their meat [fol. 65] and meat preparations under the approval of the laws and regulations of the Department of Agriculture and bear Government labels as being clean, pure and wholesome food. Each pleads that it has, according to its honest belief, sold "kosher" meat. The statutes of New York in question, as hereinafter set forth, provide requirements for merchants, similarly situated as the complainants, in selling or accepting for sale kosher and non-kosher meat or meat preparations. The claim is that the District Attorney of the County of New York, where the complainants carry on their business, and the Attorney General of the State of New York, threaten to prosecute all complaints against persons engaged as merchants in the business complainants are engaged in, if they fail to comply with the provisions of this statute, in the sale of meat and meat prepara-

tions such as kosher, and it is alleged that the aforesaid threats of prosecution on the part of the defendants and by reason of the fear inspired by the enactment and requirements of the laws in question, the complainants and their customers are called upon at their peril, to determine whether or not any meat products are kosher or non-kosher, and to label the same in accordance with the requirements of the statutes set forth, which would be a great detriment and injury to the complainants' good will and established trade. There are the further allegations that the amount in each complaint involves more than the sum of Three thousand dollars.

The principal contention is that in order to determine the guilt of one who violates the statute, it is necessary to determine what [fol. 66] the Jewish Law, and the customs, traditions and precedents of the orthodox Jewish religious requirements necessitates, so that such meats as the complainants handle, may be sold as kosher or non-kosher. There are allegations that the complainants label their meat "kosher" and that they prepare it in strict accordance with what the complainants honestly believe to be the orthodox religious requirements in so far as it is humanly possible for the complainants to so determine. There are general allegations that the complainants sell only such meats as are clean, wholesome and proper food commodities, carefully inspected and eminently fitted and desirable for human consumption. By this it is said that the statute is vague and indefinite and fails to describe what constitutes kosher meat. There is also an allegation that one of the complainants is engaged in interstate commerce and that the statute in question constitutes the imposition of an undue burden on interstate commerce.

Both sections of the Constitution (Art. 14, Section 1; Art. 1, Section 8) are said to be violated. If the statutes in question are unconstitutional, as claimed, the complainants are entitled to equitable relief under the bill. (Wilson vs. New, 243 U. S. 332; Hamilton vs. Kentucky Distilleries, 251 U. S. 146; Ruppert vs. Caffey, 251 U. S. 246.)

The statutes are as follows:

"A person, who, with intent to defraud:

* * * * * * *

4. Sells or exposes for sale any meat or meat preparation and falsely represents the same to be kosher, or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements; or falsely represents any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon the [fol. 67] word 'kosher' in any language or sells or exposes for sale in the same place of business both kosher and nonkosher meat or meat preparations who fails to indicate on his window signs and all display advertising, in block letters at least four inches in height, 'kosher and nonkosher meat sold here;' or who exposes for sale in any show window or place of business both kosher and nonkosher

meat or meat products who fails to display over such meat or meat preparation so exposed a sign in block letters at least four inches in height reading 'kosher meat,' or 'nonkosher meat,' as the case may be, Is guilty of a misdemeanor." (Section 435.)

"Sale of Kosher Meat and Meat Preparations.—A person, who, with intent to defraud, sells or exposes for sale any meat or meat preparation and falsely represents the same to be kosher whether such meat or meat preparation be raw or prepared for human consumption, or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements; or falsely represents any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon the word 'kosher' in any language; or sells or exposes for sale in the same place of business both kosher and nonkosher meat or meat preparations, either raw or prepared for human consumption, who fails to indicate on his window signs and all display advertising in block letters at least four inches in height, 'kosher and nonkosher meat sold here;' or who exposes for sale in any show window or place of business both kosher and nonkosher meat or meat preparations, either raw or prepared for human consumption, who fails to display over each kind of meat or meat preparation so exposed a sign in block letters at least four inches in height reading 'kosher meat,' or 'nonkosher meat,' as the case may be, is guilty of a misdemeanor." (Section 435a).

The effect of these statutes is to continue the prohibition of selling, as kosher, any food product which is not kosher with intent to defraud and to add a prohibition against the sale of both kosher and nonkosher meat preparations in the same shop with intent to defraud when not indicating, by an appropriate and described sign, that both kosher and nonkosher products are dealt in, and labeling each article sold or exposed for sale. Is the word "kosher" and the phrase "Orthodox Hebrew religious requirements" vague, uncertain [fol. 68] and indefinite, as used in the statute? The argument is that no man can really be said to have an intent to defraud his fellowman when he cannot, from the very nature of the case, know that his act will be fraudulent or otherwise. And it is argued, that the term "kosher" embraces a great controversial field of ecclesiastical law, neither defined nor definable, and that the phrase "Orthodox Hebrew Religious requirements" embraces a multitude of degrees of orthodoxy and customs, traditions and precedents, oral and written, some of which are in direct conflict with each other, involving the use of a fine judgment based upon a thorough and exhaustive knowledge and rather a matter of individual belief or judgment which is always indefinite and undefinable. Thus, it is said, the honest merchant is confronted with an insurmountable difficulty. The further claim is that in the case of a jury trial, the jury would not be merely applying a standard adopted by the legislature, but will, in itself, be devising and creating the standard which, it is claimed, is condemned by the Supreme Court decisions. Reliance is placed in

this argument upon the principle announced in United States vs. Cohen (255 U. S. 81). That case, in effect, holds that the legislature must define the new offense and provide for its punishment in well expressed language that will not deceive the common mind. The idea being that the citizen should not unnecessarily be placed on a plane whereby an honest error in the construction of a penal statute, may be subject to a prosecution. Before punishment can be inflicted the offenders must be honestly and plainly within the statute. (Rich vs. Went, 134 U. S. 632). Laws which define crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. (United States vs. Brewer, 139 U. S. 278.

[fol. 69] It is evident from a reading of these statutes that it was the intention of the New York Legislature to specifically make an intent to defraud an essential element of the offense created. It was to prevent fraud and imposition in the sale of meat for the orthodox Hebrew religious population that the legislation in question was enacted. The State legislatures have long been held competent to enact laws intended to prevent fraud and imposition. A State statute requiring all compound syrups to be labeled conspicuously with the percentage of each ingredient, naming the preponderating ingredient first, is one for the prevention of adult-ration and fraud, and the manufacturer has no Constitutional right to sell goods without giving to the purchaser such fair information as commanded by that statute. (Corn Products Refining Co. vs. Eddy, 249 U. S. 427). A statute which prohibits the sale of ice cream containing less than a specified percentage of butter fat, although the product sold was concededly wholesome, is a law designed to prevent persons from being misled to the weight, measure, quality or ingredients of the article of general consumption, and it is within the police power of the State to so legislate. (Hutchison Ice Cream Co. vs. Iowa, 242 U. S. 153) A statute requiring lard to be labeled "black lard" or "intestinal lard" so as to prevent the public from being misled as to the quality purchased, is not in violation of the rights of the State legislature. (Armour vs. North Dakota, 240 U. S. 510) where the evident purpose of the statute is to prevent fraud and imposition in the sale of food for domestic animals, which is deemed a matter of great importance to the State, and where its terms are directed to that end, they are not unreasonable. (Savage vs. Jones, 225 U. S. 501.)

The complainants urge that they have built up a large and profitable business in the sale of kosher meat products. Their business, as they have created it, must of necessity be on the faith of their [fol. 70] customers, orthodox Hebrews, to whom kosher meat is well known and understood. The meat products become desirable to them only when prepared, cured and sold under the method of their religious training. Complainants say they have long sold kosher meat products and it must be that the term "kosher" has long been understood by them. The authorities of Hebraic law may differ as to what should be done in the slaughtering and curing of these meat products. The variation of opinion as to what

acts are to be performed and what conduct is to be followed in preparing and caring for kosher meat, will not render the statute uncertain or vague. (United State vs. Standard Brewery, 251 U. S. 210; Hamilton vs. Kentucky Distilleries, 251 U. S. 146.)

But under the statute, there must appear, in order to convict of the crime, an act and intent to defraud, and because of this there can be no such indefiniteness as to violate the guaranty by the Fourteenth Amendment of due process of law. (Omaechevarria vs. Idaho, 246 U. S. 343.) In Heath & Milligan Co. vs. Worst (207 U. S. 338), the Supreme Court considered a penal statute of North Dakota prohibiting the sale or exposure for sale of any paint containing any ingredient other than pure linseed oil, pure carbonate of lead, oxide of zinc, turpentine, Japan dryer and pure colors, unless the paint was properly labeled with a label showing the percentage of each ingredient not specified and the name and residence of the manufacturer. It was there said, where the objection of indefinitenss and vagueness was presented in the use of the phrase "pure colors:"

[fol. 71] "We regard these criticisms answered by our general discussion, and we have specially noticed them that it may not be thought we have overlooked them. They may emphasize what we have already said as to the possible imperfection of the classification of the statute. It must not be forgotten, however, that inaccuracies of definition may be removed in the administration of the law. And it must be borne in mind that the use of the non-enumerated ingredients is not forbidden nor the advantages of the practical tests and scientific research made by appellants taken away from them. The sole prohibition of the statute is that those ingredients shall not be used without a specific declaration that they are used —a burden maybe, but irremediable by the courts—maybe, inevitable, in legislation directed against the adulteration of articles or to secure a true representation of their character or composition."

Nor do we think that the statute affects interstate commerce so as to be an unwarranted interference thereof. The burden of the statute is to prevent fraud and imposition in the sale of kosher meats, which the legislature of the State in its wisdom thought to require protection. In no sense is it aimed at interstate commerce. It does not discriminate against interstate commerce. It promotes honest dealing by merchants dealing in kosher meat. While the State cannot, under the claim of exerting its police powers, undertake what is essentially a regulation of interstate commerce, or impose a direct burden upon that commerce, still when the local regulation has a real relation to the suitable protection of the people of the State, and is reasonable in its requirements, it is not invalid because it may incidentally affect interstate commerce, provided it does not conflict with legislation enacted by the Congress pursuant to its constitutional authority. (Savage vs. Jones, 225 U. S. 501; Sligh vs. Kirkwood, 237 U. S. 52; Ames Bird Co. vs. Thompson, 274 Fed. 702.)

Legislation in a great variety of ways may affect commerce and

persons engaged in it without constituting a regulation of it within [fol. 72] the meaning of the Federal Constitution. Legislation of a State not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operation of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuits. (Plumley vs. Mass., 155 U. S. 461.)

The Court of Appeals of the State of New York has held that the use of the word "kosher" used in the statute, is used in no indefinite sense, but by its ordinary meaning as such term is used in the trade. It is to designate meat as having been prepared under, and a product sanctioned by the orthodox Hebrew religious requirements, and thus the Legislature has definitely defined the word "kosher" as used in the statute. (People vs. Atlas, 183 App. Div. 595; affd. 230 N. Y. 629.)

We think that the attack made upon this statute must fail, and that the statute in no way is legislation in contravention of the Federal Constitution.

The applications for preliminary injunctions are denied, and the motions to dismiss the complaints are granted.

Dated March 22, 1923.

[fol. 73] UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING INJUNCTION AND DISMISSING BILL OF COMPLAINT—Filed April 25, 1923

This cause having come on to be heard on the order to show cause why a preliminary injunction should not issue as prayed for in the bill of complaint and on the motions made by the respective defendants to dismiss the bill of complaint, and the Court having heard the arguments of David L. Podell, Esq., Solicitor for the complainant, Samuel H. Hofstadter, Esq., Solicitor for the defendant Carl Sherman, as Attorney General of the State of New York, and John Caldwell Myers, Esq., Solicitor for the defendant Joab H. Banton, District Attorney of New York County, and due deliberation having been had, it is

Ordered that the motion for an injunction pendent lite be and it hereby is denied; and it is

Fourth ordered that the bill of complainant herein be and it hereby is dismissed.

Dated: New York, April 25, 1923.

Enter.

Martin T. Manton, C. J. Learned Hand, D. J. Jno. C. Knox, D. J.

[fol. 74] [File endorsement omitted.]

[fol. 75] UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR AND ORDER ALLOWING APPEAL—Filed May 1, 1923

To the Honorable Julian W. Mack, U. S. Circuit Judge:

The above named appellants respectfully show:

That they consider themselves aggrieved by the order made and entered in the United States District Court for the Southern District of New York, on the 25th day of April, 1923, in the office of the Clerk of this Court, denying the motion for an injunction pendente lite and dismissing the bill of complaint and do hereby petition for an appeal from said order and decree to the Supreme Court of the United States for the reasons set forth in the assignment of errors herewith and pray that an appeal may be allowed and citation granted and directed to the defendants herein and all other parties in interest, commanding them and each of them to appear before the Supreme Court of the United States.

Dated, New York, April 26, 1923.

Hygrade Provision Co., Inc., E. Greenebaum Co., Inc., and Guckenheimer & Hess, Inc., by David L. Podell, Solicitor for Complainants, Office & P. O. Address 233 Broadway, New York City.

The foregoing appeal and petition therefor is hereby allowed.
Dated New York, May —, 1923.

J. W. Mack, U. S. Circuit Judge.

[fol. 76] [File endorsement omitted.]

[fol. 77] UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL—Filed May 1, 1923

SIRS: Please take notice that Hygrade Provision Co., Inc., E. Greenebaum Co., Inc., and Guckenheimer & Hess, Inc., feeling themselves aggrieved by the order and decree made and entered herein dated the 25th day of April, 1923, hereby appeal to the Supreme Court of the United States, to be holden at the Capitol, in the City of Washington, in the District of Columbia, from the said order denying the motion for an injunction pendente lite and dismissing the bill of complaint and from each and every part of said order.

Dated New York, April 26th, 1923.

David L. Podell, Solicitor for Complainants, Office & P. O. Address, 233 Broadway, Borough of Manhattan, New York City.

To Samuel H. Hofstadter, Esq., Solicitor for Carl Sherman, as Attorney General of the State of New York, Office & P. O. Address 60 Wall Street, New York City. John Caldwell Myers, Esq., Solicitor for Joab H. Banton, as District Attorney of the County of New York, Office & P. O. Address 32 Franklin Street, New York City.

[fol. 78] [File endorsement omitted.]

[fol. 79] UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed May 1, 1923

Come now the complainants and file the following Assignment of Errors upon which they rely for their appeal from the decree made by this Honorable Court on the 25th day of April, 1923, in the above entitled action dismissing the complainants' bill and denying to them the relief prayed for.

1. That the Court erred in denying the application for an injunction pendente lite.

2. That the Court erred in dismissing the bill of complaint.

3. That Chapter 580 of the Laws of 1922 is so vague, indefinite and uncertain as to be a violation of the constitutional rights of the complainants under Section I, Article XIV of the Constitution of the United States.

4. That Chapter 581 of the Laws of 1922 is so vague, indefinite and uncertain as to be a violation of the constitutional rights of the complainants under Section I, Article XIV of the Constitution of the United States.

[fol. 80] 5. That Chapter 233 of the Laws of 1915 is so vague, indefinite and uncertain as to be a violation of the constitutional rights of the complainants under Section I, Article XIV of the Constitution of the United States.

6. That Chapter 580 of the laws of 1922 involves a stigmatization of the complainants' goods and thus destroys their value which is a deprivation of property within the meaning of Section I, Article XIV of the Constitution of the United States.

7. That Chapter 581 of the Laws of 1922 involves a stigmatization of the complainants' goods and thus destroys their value which is a deprivation of property within the meaning of Section I, Article XIV of the Constitution of the United States.

8. That Chapter 580 of the Laws of 1922 denies the complainants the equal protection of the law and is thus in violation of Section I, Article XIV of the Constitution of the United States.

9. That Chapter 581 of the Laws of 1922 denies the complainants the equal protection of the law and is thus in violation of Section I, Article XIV of the Constitution of the United States.

10. That Chapter 233 of the Laws of 1915 denies the complainants the equal protection of the law and is thus in violation of Section I, Article XIV of the Constitution of the United States.

11. That Chapter 580 of the Laws of 1922 imposes an undue and unreasonable burden upon articles which are the subject of Interstate Commerce and is therefore in violation of Section VIII, Article I of the Constitution of the United States.

[fol. 81] 12. That Chapter 581 of the Laws of 1922 imposes an undue and unreasonable burden upon articles which are the subject of Interstate Commerce and is therefore in violation of Section VIII, Article I of the Constitution of the United States.

13. That Chapter 233 of the Laws of 1915 imposes an undue and unreasonable burden upon articles which are the subject of Interstate Commerce and is therefore in violation of Section VIII, Article I of the Constitution of the United States.

In order that the foregoing Assignment of Errors may be and appear of record, the complainants present the same to the Court, and pray that such disposition be made thereof as in accordance with the laws and the statutes of the United States in such cases provided, and the complainants pray for a reversal of the decretal order and decree of dismissal made and entered by said Court.

David L. Podell, Attorney and Solicitor for Complainants, Office & P. O. Address 233 Broadway, Borough of Manhattan, New York City.

[fol. 82] [File endorsement omitted.]

[fol. 83] Citation in Usual Form Showing Service on Carl Sherman—Filed May 3, 1923, and omitted in printing

[fol. 84] [File endorsement omitted.]

[fol. 85] District Court of the United States

[Title omitted]

Stipulation Extending Time—Filed June 1, 1923

It is hereby stipulated and agreed by and between the Attorneys for the respective parties hereto that the return day of the Citation

in the above entitled case be extended from May 31st, 1923, up to and including June 15th, 1923.

Dated New York, May 29th, 1923.

David L. Podell, Solicitor for Complainants. John Caldwell Myers, Solicitor for District Attorney, Joab H. Banton. Samuel Hofstadter, Solicitor for Attorney General, Carl Sherman.

The foregoing is consented to.

Dated New York, May 31st, 1923.

Alex. Gilchrist, Clerk.

[fols. 86 & 87] Bond on Appeal for $500—Filed June 1, 1923; omitted in printing

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[fol. 88] United States District Court

[Title omitted]

Stipulation as to Transcript of Record

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

Dated May 3rd, 1923.

David L. Podell, Attorney for Complainants. John Caldwell Myers, M. J. E., Attorney for Defendant Joab H. Banton. Samuel H. Hofstadter, Attorney for Defendant Carl Sherman.

[fol. 89] United States of America,
Southern District of New York, ss:

[Title omitted]

Clerk's Certificate

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 2d day of June, in the year of our Lord one thousand nine hundred and twenty-three and of the Independence of the said United States the one hundred and forty-seventh.

Alex. Gilchrist, Jr., Clerk. (Seal of the District Court of the United States, Southern District.)

Endorsed on cover: File No. 29,713. S. New York D. C. U. S. Term No. 403. Hygrade Provision Company, Inc., E. Greenebaum Company, Inc., and Guckenheimer & Hess, Inc., appellants, vs. Carl Sherman, as Attorney General of the State of New York, and Joab H. Banton, as District Attorney of the County of New York. Filed June 29th, 1923. No. 29,713.

(29,714)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 404

LEWIS & FOX COMPANY, APPELLANT,

vs.

CARL SHERMAN, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, AND JOAB H. BANTON, AS DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 17, 1924

[fol. 1] **DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK**

In Equity

LEWIS & FOX COMPANY, Complainant,

against

CARL SHERMAN, as Attorney General of the State of New York, and Joab H. Banton, as District Attorney of the County of New York, Defendants

RULE TO SHOW CAUSE—Filed January 31, 1923

Upon the bill of complaint and affidavit of David L. Podell hereto annexed, duly verified the 12th day of January, 1923, Let the defendants and each of them appear at a stated term of this court to be composed of Judges in accordance with Section 266, Judicial Code amended (Section 1243 of the United States Compiled Statutes) to be held at the United States Court House in the Old Post Office Building on the 29th day of January, 1923, at 10:30 A. M. of that day or as soon thereafter as counsel can be heard and show cause why an order should not be made herein enjoining and restraining the defendant Carl Sherman, as Attorney General of the State of New York, and Joab H. Banton as District Attorney of the County of New York, from instituting proceedings of any kind for any act done or committed or omitted by the complainant, its officers and agents, and why the complainant should not have such other and further relief as to the court may seem just and equitable.

Service of a copy of this order on the defendants on or before the 19th day of January, 1923, shall be deemed sufficient.

Dated New York, January 17th, 1923.

Jno. C. Knox, U. S. D. J.

[fol. 2] STATE OF NEW YORK,
County of New York,
City of New York, ss:

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF D. L. PODELL

David L. Podell, being duly sworn, deposes and says that he is an attorney-at-law and represents the complainant in the above entitled action. That he has had under consideration Chapters 580 and 581 of the Laws of 1922 of the State of New York which require the

labeling of meat products as kosher or nonkosher in a manner more fully set forth in paragraphs Sixth and Seventh of the bill of complaint annexed hereto. The deponent verily believes that the said enactments are void and unconstitutional in that they deprive the complainant of property without due process of law, in violation of Section 1, Article 14 of the Constitution of the United States and deny to the complainant the equal protection of the law, in violation of Section 1, Article 14 of the Constitution of the United States, and unreasonably interfere with the interstate trade and commerce of the complainant, in violation of Section 8, Article 1 of the Constitution of the United States.

That by reason of the fact that a serious question of constitutional law is involved, it is of the utmost importance and of public concern that this application be speedily heard in order that the rights and interests of the parties may be determined. No previous application has been made for this rule to show cause in this suit.

Wherefore, a rule to show cause is sought returnable within 14 days.

David L. Podell.

Sworn to before me this 12th day of January, 1923. Benjamin S. Kirsh. Benjamin S. Kirsh, Notary Public, New York County, No. 416. Reg. No. 4377. Commission expires March 30th, 1924.

[fol. 3] UNITED STATES DISTRICT COURT

[Title omitted]

BILL OF COMPLAINT

To the honorable judges of the District Court of the United States for the Southern District of New York:

Lewis & Fox Company, of the State of Massachusetts, brings this, its bill of complaint, against Carl Sherman, as Attorney General of the State of New York, and Joab H. Banton, as District Attorney for the County of New York, in the State of New York, and thereupon your orator complains and says:

First. That your orator is a corporation organized under the laws of the State of Massachusetts, with its principal place of business in the City of Boston, State of Massachusetts. That the defendants herein, Carl Sherman and Joab H. Banton, are residents and citizens of the State of New York. That the amount in dispute herein exceeds, exclusive of interest and costs, the sum or value of Three thousand ($3,000) Dollars.

Second. Your orator further says that on or about the 1st day of July, 1916, it commenced the conduct of a general provision supply

business, which embraces the purchase and sale of various meat [fol. 4] commodities, both raw and prepared, and has conducted said business ever since said date, and is now conducting the same. That said commodities, both raw and prepared, have been sold and shipped by your orator to, into, and through several states in the Union other than the State of Massachusetts, and that large quantities of said meat commodities have, by your orator, been shipped to, into, and through the State of New York, pursuant to sales made by your orator to citizens and residents of said State. That a large portion of the business of your orator consists of sales and shipments of said meat commodities to provision dealers and retailers located within the City and State of New York.

Third. Your orator further shows that for nearly six years last past it has invested large amounts of money in building up and thoroughly establishing within the State of New York, a large and lucrative trade among said dealers and retailers within the State of New York in the said meat commodities, and at present there are many hundreds of such dealers within said state who are buying, carrying in stock, and selling to the public, the said meat commodities prepared and sold by your orator as aforesaid. Your orator's gross annual sales in New York amount to many thousands of dollars.

Fourth. Your orator's plant, wherein such meats are prepared, is under constant and continuous government inspection and supervision. That all of the meat, whether raw or prepared, is inspected [fol. 5] and examined by duly authorized agents of the Department of Agriculture of the Government of the United States from the time it reaches the premises of your orator until it leaves said premises for delivery pursuant to sale or otherwise. Your orator sells, delivers, and ships only such meat, articles or commodities for human consumption as are approved under the laws and regulations of the Department of Agriculture as being clean, pure, wholesome and fit for human food. That any meat or meat commodity, whether raw or prepared, which does not pass a rigid inspection, and which does not receive proper approval under government supervision, is not sold for human food, and your orator therefore says that all of the meats, raw or prepared, which your orator has shipped and continues to ship into the State of New York, are pure, clean, wholesome, and proper food eminently fit and desirable for human consumption.

Fifth. That such meat commodities have come to be used very extensively by the public throughout the State of New York, as well as in other states, and the good name, good will and trade thus established is of very great value to your orator. That the large bulk of the meat sold and shipped by your orator into the State of New York and elsewhere, is wrapped in separate parcels, boxes and barrels bearing the name of your orator inscribed thereon, and your orator has thereby become well and favorably known to the trade and to his customers as producing a desirable wholesome commodity prop-

[fol. 6] erly inspected and approved under government supervision, and entirely fit and desirable for human consumption.

Sixth. Your orator further shows: That the Legislature of the State of New York at its 1915 session adopted an Act, known as Subdivision 4 of Sec. 435 of the Penal Law, which was duly approved and went into effect on the 1st day of September, 1915, which law provided as follows:

"A person who, with intent to defraud: Sells or exposes for sale any meat or meat preparation, and falsely represents the same to be kosher, or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements; or falsely represents any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon the word 'kosher' in any language, is guilty of a misdemeanor."

Seventh. Your orator further says: That the Legislature of the State of New York, at its 1922 session, passed an Act "to amend the Penal Law in relation to the sale and offering for sale of kosher meat or meat preparations," which act was approved April 11th. 1922, and became Chapter 580 of the Laws of 1922 of the State of New York. That said Act provides:

"Section 1. The penal law is hereby amended by inserting therein a new section, to follow section four hundred and thirty-five, to be section four hundred and thirty-five-a. to read as follows:

"Sec. 435-a. Sale of Kosher Meat and Meat Preparations.—A [fol. 7] person, who, with intent to defraud sells or exposes for sale any meat or meat preparation and falsely represents the same to be kosher, whether such meat or meat preparation be raw or prepared for human consumption, or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements; or falsely represents any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon the word 'kosher' in any language; or sells or exposes for sale in the same place of business both kosher and nonkosher meat or meat preparations, either raw or prepared for human consumption, who fails to indicate on his window signs and all display advertising, in block letters at least four inches in height, 'kosher and nonkosher meat sold here'; or who exposes for sale in any show window or place of business both kosher and nonkosher meat or meat preparation, either raw or prepared for human consumption, who fails to display over each kind of meat or meat preparation so exposed a sign in block letters at least four inches in height reading 'kosher meat,' or 'nonkosher meat,' as the case may be, is guilty of a misdemeanor.

"Sec. 2. This Act shall take effect September first, nineteen hundred and twenty-two."

Eighth. Your orator further shows: That the Legislature of the State of New York, at its 1922 session, passed an act to amend the Penal Law in relation to the sale of kosher meat or meat preparation, which act was approved on April 11th, 1922, and thereupon became Chapter 581 of the Laws of 1922 of the State of New York. That said act provides:

"Section 1. Subdivision four of section four hundred and thirty-five of the penal law is hereby amended to read as follows:
[fol. 8] "4. Sells or exposes for sale any meat or meat preparation and falsely represents the same to be kosher, or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements; or falsely represents any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon the word 'kosher' in any language; or sells or exposes for sale in the same place of business both kosher and nonkosher meat or meat preparations who fails to indicate on his window signs and all display advertising, in block letters at least four inches in height, 'kosher and nonkosher meat sold here'; or who exposes for sale in any show window or place of business both kosher and nonkosher meat or meat products who fails to display over such meat and meat preparation so exposed a sign in block letters at least four inches in height reading 'kosher meat,' or 'nonkosher meat,' as the case may be.

"Sec. 2. This act shall take effect immediately."

Ninth. And your orator further shows: That the phrase "orthodox Hebrew religious requirements," as used in all of the above enactments, is vague, indefinite, uncertain and incapable of correct and common definition.

Tenth. Your orator further shows: That the said term "kosher" used in all of said enactments is a word of the Hebrew language, and is likewise vague, indefinite, uncertain, and incapable of correct and common definition. That its meaning is essentially based upon the phrase "orthodox Hebrew religious requirements."

Eleventh. And your orator further shows: That where used in a strictly Hebrew religious sense, the term "kosher" may be described as clean, fit, proper, according to the orthodox Hebrew religious re-[fol. 9] quirements, and the term "not kosher" may be described as meaning unclean, unfit and improper according to the orthodox Hebrew religious requirements.

Twelfth. And your orator further shows: That among the hundreds of customers within the State of New York to whom your orator has sold and shipped raw and prepared meat commodities are large numbers of dealers and retailers who sell what may be described, according to their best belief, as kosher and nonkosher meats. That by reason of the confusion and lack of proper definition of the word "kosher," your orator has, in the past, avoided

wherever possible, labeling the merchandise either as "kosher" or "nonkosher," but has been at all times scrupulously careful to sell meats and meat commodities that were pure, clean and proper food for human consumption. That wherever your orator could possibly determine in advance as to whether any meat commodity in his honest belief might be called "kosher," he has sold the same as kosher but not otherwise and it has been impossible for your orator to determine with any degree of certainty, reasonable or otherwise, as to what is or what is not "kosher." Various commodities have been brought to your orator marked or labeled "kosher." That your orator could not possibly have known the process or the origin through which the said meat had been put to prior to the time that it was brought to the premises of your orator, and had he known the process through which it had been put, it would be equally difficult, if not impossible, to determine whether the animals from which they [fol. 10] were derived were so slaughtered, or whether they were so prepared after slaughtering as to comply with the orthodox Hebrew religious requirements.

Thirteenth. That your orator is advised by his counsel, and therefore avers, that under the amendments above set forth, all such dealers or retailers who sell both kosher and nonkosher meat commodities in their premises will be obligated to determine which of said products are kosher and which are not kosher, and likewise will be obligated to label or post a sign in four inch block letters upon all such commodities exposed for sale in the same place of business, identifying such individual packages as kosher or not kosher, whichever the case may be. That all such dealers or retailers who sell both kosher and nonkosher meats or meat products will be required to post a sign upon their windows or show windows or in their display advertising, announcing that both kosher and nonkosher meats are sold in the said premises.

Fourteenth. Your orator is further advised and therefore avers, that the defendant Carl Sherman is the duly elected Attorney General of the State of New York, and the defendant Joab H. Banton is the duly elected District Attorney for the County of New York, and therefore the prosecuting officer for said County, and that the said Attorney General and the said District Attorney have threatened to prosecute all complaints against persons or concerns engaged as [fol. 11] dealers, retailers or otherwise in the sale of raw or prepared meat commodities who are charged with violating the provisions of the statutes hereinbefore referred to.

Fifteenth. And your orator further shows: That by reason of the threats of prosecution, and by reason of the fear inspired by the enactments and by the requirements of the above laws, large numbers of complainant's customers when called upon at their peril to determine whether the meats or meat products are kosher or not kosher, and to label the same in accordance with the requirements of the law, have decided and will continue to decide that all of the products sold by your complainant are not kosher. That such de-

termination or decision on the part of said customers has been and will be entirely induced by the fear that some judge or jury might determine that the Rabinical Law or the customs, traditions and precedents of the orthodox Hebrew religious requirements necessitate that even such meats as your orator sells as kosher are not kosher. That as your orator has fully set forth above any such meats or meat products as are sold and shipped from your orator's premises with the label "kosher" thereon, are according to the best information and belief of your orator prepared in strict accordance with what your orator honestly believes to be the orthodox Hebrew religious requirements, in so far as it is humanly possible for your orator to determine what such requirements are. In any event, your orator alleges that all of the meats sold and shipped from the complainant's place of [fol. 12] business are clean, wholesome, proper food commodities carefully inspected and eminently fit and desirable for human consumption.

Sixteenth. Your orator further shows: That the labeling of any meats produced by your orator as not kosher is an unjust, an unwarranted and unreasonable slander upon the property of your complainant.

Seventeenth. Your orator further shows: That by reason thereof he will be irreparably damaged in serious loss, destruction and interference with his trade and good will, and with his name and business reputation. That he will likewise be irreparably damaged in the deprivation and loss of numbers of his customers. That the sales and shipments made by your orator to, into and through the State of New York will thereby be substantially lessened and decreased. That his good will will, in course of time, be destroyed. That his investment of hundreds of thousands of dollars in his plant and in his equipment and his other property, real and personal, of the kind utilized in the conduct of his business will be substantially diminished in value, if not rendered of no value at all.

Eighteenth. And your orator further shows: As he is informed and verily believes that there is very little if any cattle raising within the border of the State of New York. That the percentage of slaughter houses within the border of the State of New York is exceedingly small in comparison with the tremendous demand and [fol. 13] requirements and the quantities of meat of both raw and prepared consumed by the residents of the State of New York. That as your orator is advised and verily believes, more than ninety percent (90%) of the meats consumed within the borders of the State of New York comes and is derived from cattle raised in states other than the State of New York. That as your deponent is advised and verily believes, more than eighty percent (80%) of the meats consumed within the State of New York is derived from animals slaughtered in states other than the State of New York. That in short, the vast bulk of the meats and meat products consumed by the inhabitants and residents of the State of New York must be im-

ported from outside of said State, either from other states of the Union, or from foreign countries.

Nineteenth. And your orator alleges: That it sells and ships into the State of New York from the State of Massachusetts more than Sixty thousand ($60,000) Dollars worth of meats every year, and that the packers of the country located in states other than the State of New York, likewise ship into the State of New York meats and meat products of the value of hundreds of millions of dollars every year. That the sales made by your orator in the State of New York are made both at the City of Boston in the State of Massachusetts, as well as at points within the State of New York, to be delivered to points within the State of New York to purchasers and consumers within the State of New York in their original unbroken packages.

Twentieth. And your orator further shows: That unless restrained [fol. 14] and enjoined by the order of this Court, said defendants, in their efforts to enforce the foregoing enactments will continue to threaten prosecutions of all those who do not comply with the foregoing requirements, and will thereby intimidate and annoy numerous persons engaged in selling the meats and meat products of your orator within the State of New York, and that their course will be followed by other prosecuting attorneys within the State of New York, and will likewise threaten and procure prosecutions of the persons selling the merchandise of your orator, and the inevitable effect thereof will be to interfere and obstruct the plaintiff in the conduct of his business in the State of New York, causing him great financial loss, interfering with his property rights in said meats and meat preparations, and with his right to vend the same freely in the State of New York, and will thereby inflict great and irreparable injury upon your orator which it will be impossible to compensate in damages or accurately to ascertain, and for which there is no adequate legal remedy. That many of the persons engaged in the sale of plaintiff's said meats and meat products have already discontinued their purchase and sales of said meats and meat preparations because of the fear of criminal prosecution induced by the threats of said defendant as aforesaid, and that large numbers of those who are not handling said meats and meat preparations, and are not buying and selling same in said State, will be hereafter induced by said threats to discontinue the sale thereof, unless the defendants are restrained as aforesaid from threatening such prose- [fol. 15] cutions, and from all other acts calculated to induce the plaintiff's said customers to believe that by purchasing and selling said meats or meat preparations from your plaintiff without such labels or notices, or by erroneously labeling the same they expose themselves to such threatened prosecution.

Twenty-first. And your orator further shows: That the irreparable injury to and destruction of the property and property rights and the trade and good will of plaintiff's customers, as above set forth, deprive your orator of his property without due process of law in violation of Section 1, Article 14 of the Constitution of the United

States, and that said statute will also deprive said plaintiff of his right to vend and sell within the State of New York and sell his products in the State of New York, which right of itself is property of great value without due process of law, and in violation of said Section 1, Article 14 of the Constitution of the United States.

Twenty-second. And your orator further avers: Said acts of the Legislature of the State of New York, fully above set forth, are void because contrary to and in violation of so much of Section 1, Article 14 of the Constitution of the United States as provides that no state shall deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the law.

Twenty-third. And your orator further shows: That said enactments fully above set forth are also in violation of so much of Sec- [fol. 16] tion 8 of Article 1 of the Constitution of the United States as confers upon the Congress of the United States the power to "regulate commerce with foreign nations and among the several States and with the Indian tribes," and in that said act and each of said sections will, if enforced, unreasonably interfere with commerce between the several states, and will, as heretofore alleged, interrupt and destroy the interstate commerce in which your complainant alleges he is largely engaged as aforesaid.

Twenty-fourth. And your orator further shows and states to the Court: That such meats and meat preparations herein referred to have been for years past and are put up and are for sale in several different size packages.

Twenty-fifth. And your orator further shows and states to the Court that a large portion of said meats and meat preparations, herein referred to, have been for years past and now are put up and offered for sale in several different size packages, all of which have come to be commonly known to the trade in general as identifying the goods of your orator's manufacture and preparation. That the varied shapes and sizes of the several packages thus employed require the use of varying labels, designs, etc., all of which have come to be well and commonly known to the trade as identifying the commodity of your orator's manufacture, and all of which have been prepared by your orator at great expense to accommodate the carrying on of such business, and under the enactments above set forth, it will be necessary, for purposes of identification, to label all pack- [fol. 17] ages sold by your plaintiff either as kosher or nonkosher. That the requirement of such character on each of the packages so sold constitutes the imposition of an undue burden on articles which are the subject of interstate commerce, and prevents the sale of such articles of interstate commerce, all of which is a violation of Section 1, Article 14 of the Constitution of the United States, as well as Section 8, Article 1, of the Constitution of the United States. That the vagueness and uncertainty and the impossibility to define and determine what is meant by the phrase "orthodox Hebrew religious re-

quirements," or by the word "kosher," or by the words "not kosher," renders it impossible for any citizen to know or understand when he is or when he is not committing a violation of such statute, or when he is or is not subjecting himself to criminal prosecution under such statute, and that in any instance when your deponent sells or exposes for sale within the State of New York to a consumer any of his meat products for shipment from the State of Massachusetts into the State of New York, it will be impossible for your orator to determine when he is and when he is not committing a violation of said statute or subjecting himself to criminal prosecution, and in that regard, said statute violates Section 1, Article 14 of the Constitution of the United States.

Twenty-sixth. And your orator further shows: That unless a temporary injunction is issued in this cause prohibiting and restraining the defendants from doing any of the acts complained of herein pending a suit and until a final hearing thereof, said defendants [fol. 18] will, before such final hearing, have consummated and accomplished said acts or threatened acts in whole or in part, and will have seriously interfered with and substantially destroyed plaintiff's said business and good will in the State of New York, thereby rendering and y relief which the Court might otherwise grant upon a final hearing ineffective and of no avail.

Now, therefore, the premises being considered, may it please the Court to grant unto your orator a writ of subpœna commanding the defendants at a day therein to be inserted, to be and appear before this Honorable Court, there to answer without oath (their oaths being hereby expressly waived), and all singular of the premises, and to do and abide by such order and decree as this Honorable Court shall make therein; and until a final hearing of said cause, for as much as by reason of the premises the defendants will, unless restrained by order of this Court take such action in the premises as will greatly injure and destroy the rights of your orator before a final hearing can be had upon the merits of this cause; and your orator further prays that your Honors will, pending said final hearing, grant a temporary injunction after proper notice of a hearing of this application for a temporary injunction at such time as your Honors shall designate, restraining and forbidding the defendants, their agents, assistants and attorneys from taking any action in the premises or from instituting any proceeding against your orator, his employees, agents or representatives, his customers or any one [fol. 19] dealing with or selling the said meats or meat products for any alleged failure to comply with the requirements of said enactments, and enjoining and prohibiting the said defendant, during the pendency of this suit and until the final hearing and determination thereof, from making any threats of prosecuting or from conducting any prosecutions of any and all persons by reason of their failure to label any of the meats sold by your complainant as "not kosher," or by reason of their failure to exhibit a four inch block letter sign or any sign upon the meats or meat products sold by your complainant bearing the words "not kosher," or from in any manner interfering or seeking to prevent the full, free and unhamp-

ered sale of the products of your orator within the State of New York without labeling or designating the same as "not kosher," and from injuring the business of your complainant by compelling it to be discredited in standing and reputation, and by having its merchandise branded as "nonkosher," in accordance with the requirements of said enactments.

And will your Honors grant unto your orator all such further relief as may be just and equitable in the premises.

David L. Podell, Solicitor for Complainant.

[fol. 20] Jurat showing the foregoing was duly sworn to by Benjamin Fox omitted in printing.

[fol. 21] [File endorsement omitted.]

[fol. 22] District Court of the United States

[Title omitted]

Stipulation Amending Bill of Complaint—Filed Feb. 24, 1923

It is hereby stipulated and agreed by and between the Attorneys for the respective parties hereto that the first sentence of paragraph marked "Second" in the case entitled Lewis & Fox Company vs. Carl Sherman, et al., be amended so as to read as follows:

"Second. Your orator further says that on or about the 1st day of July, 1916, it commenced the conduct of a general provision supply business which embraces the purchase and sale of various meat commodities, both raw and prepared, which to your orator's honest information and belief are kosher, and has conducted said business ever since said date, and is now conducting the same."

In other respects the allegation set forth in paragraph "Second" remain unamended.

It is further stipulated and agreed that any notices, papers, exhibits and affidavits submitted in any one of the suits above named shall be deemed to be before the Court in all of the said suits.

Dated New York, February 19, 1923.

David L. Podell, Solicitor for Complainant. Carl Sherman, as Attorney General, etc., by Samuel Hofstadter, Solicitor for Carl Sherman, etc. John Caldwell Myers, Solicitor for Joab H. Banton, etc.

[fol. 23] DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF MOTION—Filed Feb. 14, 1923

SIRS: Please take notice that the motion to dismiss the bill of complaint herein has this day been filed in the District Court of the United States for the Southern District of New York, in the office of the Clerk of the said Court, and that the said motion will be set down for hearing and brought on for argument at a term of the said Court, constituted pursuant to §266 of the Judicial Code, to be held at the Old Post Office in the City and County of New York, Southern District of New York, on the — day of February, 1923, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Dated New York, February 13, 1923.

Yours, etc., Carl Sherman, Attorney General of the State of New York. Samuel H. Hofstadter, Solicitor for Defendant Carl Sherman, as Attorney General of the State of New York, 60 Wall Street, New York.

To Podell, Ansorge & Podell, Esqrs., Solicitors for Complainant, 233 Broadway, New York City.

[fol. 24] DISTRICT COURT OF THE UNITED STATES

[Title omitted]

MOTION TO DISMISS BILL OF COMPLAINT

Now comes the defendant, Carl Sherman as Attorney General of the State of New York, and upon the bill of complaint herein moves that the said bill of complaint be dismissed for the following reasons and upon the following grounds, to wit:

I. That it appears upon the face of the bill of complaint that the facts stated therein are insufficient to constitute a cause of action in equity.

II. That it appears upon the face of the bill of complaint that the complainant has a plain, adequate and complete remedy at law.

III. That it does not appear upon the face of the bill of complaint, and no sufficient facts are averred therein to show, that the intervention of a court of equity and the assumption of jurisdiction by such a court is necessary or essential in order to effectually pro-

tect the property or rights of property of the complainant from great and irreparable injury or from any injury whatsoever.

[fol. 25] IV. That Chapter 233 of the Laws of 1915, as amended by Chapter 581 of the New York Laws of 1922 (Penal Law, §435, subd. 4) is a valid statute, duly passed by the Legislature of the State of New York, in the due exercise of its lawful and constitutional powers and does not violate any of the provisions of either Article 1, §8 of the Constitution of the United States or the Fourteenth Amendment to such Constitution; and it does not appear from the face of the bill of complaint or from the facts averred therein that the said statute, or the enforcement thereof by the State of New York by and through its governmental and administrative agencies, operates or will operate to deprive or deny the complainant of the equal protection of the laws, or to deprive him of liberty or of any property or rights of property without due process of law.

V. That Chapter 580 of the New York Laws of 1922 (Penal Law §435-a) is a valid statute, duly passed by the Legislature of the State of New York, in the due exercise of its lawful and constitutional powers and does not violate any of the provisions of either Article I, §8 of the Constitution of the United States or the Fourteenth Amendment to such Constitution; and it does not appear from the face of the bill of complaint or from the facts averred therein that the said statute, or the enforcement thereof by the State of New York by and through the governmental and administrative agencies, operates or will operate to deprive or deny the complainant of the equal protection of the laws, or to deprive him of liberty or of any property or rights of property without due process of law.

[fol. 26] VI. That it appears upon the face of the bill of complaint that to grant the relief sought by the complainant would constitute an unlawful and unconstitutional interference by the agencies of the Government of the United States with the lawful and constitutional power, right and duty of the State of New York and its governmental agencies (including the Attorney General of the State of New York) to prosecute violations of criminal statutes of the State of New York.

VII. That it appears on the face of the bill of complaint that the complainant is not within the class of persons who are or may be injured by the alleged unconstitutionality of the provisions of the statutes set forth in the bill of complaint.

VIII. That it appears upon the face of the bill of complaint that this court is without power or authority to grant the relief or to render the judgment and decree prayed for.

IX. That no sufficient facts are alleged in the bill of complaint to warrant or justify the granting of the relief prayed for or any other equitable relief.

Wherefore, for the reasons and upon the grounds aforesaid, the defendant, Carl Sherman, as Attorney General of the State of New York, respectfully moves this Court that the bill of complaint herein be dismissed as to him.

Dated New York, February 8th, 1923.

Carl Sherman, Attorney General of the State of New York. Samuel H. Hofstadter, Soliictor for Defendant Carl Sherman, as Attorney General of the State of New York, No. 60 Wall Street, New York City.

[fol. 27] [File endorsement omitted.]

[fol. 28] UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF MOTION—Filed March 26, 1923

SIRS: Please take notice that the annexed motion to dismiss the bill of complaint herein has this day been filed in the District Court of the United States for the Southern District of New York in the office of the Clerk of the said Court and that the said motion will be set down for hearing and brought on for argument at a term of the said Court, constituted pursuant to §266 of the Judicial Code, to be held at the Old Post Office in the City and County of New York, Southern District of New York, on the 19th day of February, 1923, at 10 o'clock in the forenoon of that day, or as soon thereafter ae counsel can be heard.

Dated New York, February 14, 1923.

Yours, etc., Joab H. Banton, District Attorney in and for the County of New York. John Caldwell Myers, Solicitor for Defendant, Joab H. Banton.

To Messrs. Podell, Ansorage & Podell, Solicitors for Complainant, 233 Broadway, New York, N. Y.

[fol. 29] DISTRICT COURT OF THE UNITED STATES

[Title omitted]

MOTION TO DISMISS BILL OF COMPLAINT

Now comes the defendant, Joab H. Banton, as District Attorney of the County of New York, and upon the bill of complaint herein

moves that the said bill of complaint be dismissed for the following reasons and upon the following grounds, to-wit:

1. That it appears upon the face of the bill of complaint that the facts stated therein are insufficient to constitute a cause of action in equity.

2. That it appears upon the face of the bill of complaint that the complainant has a plain, adequate and complete remedy at law.

3. That it does not appear upon the face of the bill of complaint, and no sufficient facts are averred therein to show, that the intervention of a court of equity and the assumption of jurisdiction by such a court is necessary or essential in order to effectually protect the property or rights of property of the complainant from great and irreparable injury or from any injury whatsoever.

[fol. 30] 4. That it appears on the face of the bill of complaint that the complainant is not within the class of persons who are or may be injured by the alleged unconstitutionality of the provisions of the statutes set forth in the bill of complaint.

5. That Chapter 233 of the Laws of 1915, as amended by Chapter 581 of the New York Laws of 1922 (Penal Law, §435, subd. 4) is a valid statute, duly passed by the Legislature of the State of New York, in the due exercise of its lawful and constitutional powers and does not violate any of the provisions of either Article I, §8 of the Constitution of the United States or the Fourteenth Amendment to such Constitution; and it does not appear upon the face of the bill of complaint or from the facts averred therein that the said statute, or the enforcement thereof by the State of New York by and through its governmental and administrative agencies, operates or will operate to interfere unwarrantably with commerce between the several states, or to deprive or deny the complainants of the equal protection of the laws, or to deprive it of liberty or of any property or rights of property without due process of law.

6. That Chapter 580 of the New York Laws of 1922 (Penal Law §435-a) is a valid statute, duly passed by the Legislature of the State of New York, in the due exercise of its lawful and constitutional powers and does not violate any of the provisions of either Article I, §8 of the Constitution of the United States or the Fourteenth Amendment to such Constitution; and it does not appear upon the face of the bill of complaint or from the facts averred therein that the said statute, or the enforcement thereof by the State of New York by and through the governmental and administrative agencies, operates or will operate to interfere unwarrantably [fol. 31] with commerce between the several states, or to deprive or deny the complainant of the equal protection of the laws, or to deprive it of liberty or of any property or rights of property without due process of law.

7. That it appears upon the face of the bill of complaint that to grant the relief sought by the complainant would constitute an unlawful and unconstitutional interference by the agencies of the Government of the United States with the lawful and constitutional power, right and duty of the State of New York and its governmental agencies (including the District Attorney of the County of New York) to prosecute violations of criminal statutes of the State of New York.

8. That it appears upon the face of the bill of complaint that this court is without power or authority to grant the relief or to render the judgment and decree prayed for.

9. That no sufficient facts are alleged in the bill of complaint to warrant or justify the granting of the relief prayed for or any other equitable relief.

Wherefore, for the reasons and upon the grounds aforesaid, the defendant, Joab H. Banton, as District Attorney of the County of New York, respectfully moves this Court that the bill of complaint herein be dismissed as to him.

Dated February 14, 1923.

Joab H. Banton, District Attorney of the County of New York. John Caldwell Myers, Solicitor for defendant Joab H. Banton, as District Attorney of the County of New York, 32 Franklin Street, New York, N. Y.

[fols. 32-53] [File endorsement omitted.]

[fol. 54] UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING INJUNCTION AND DISMISSING BILL OF COMPLAINT—Filed April 25, 1923

This cause having come on to be heard on the order to show cause why a preliminary injunction should not issue as prayed for in the bill of complaint and on the motions made by the respective defendants to dismiss the bill of complaint, and the Court having heard the arguments of David L. Podell, Esq., Solicitor for the Complainant, Samuel H. Hofstadter, Esq., Solicitor for the defendant Carl Sherman, as Attorney General of the State of New York, and John Caldwell Myers, Esq., solicitor for the defendant Joab H. Banton, District Attorney of New York County, and due deliberation having been had, it is

Ordered that the motion for an injunction pendente lite be and it hereby is denied; and it is

Further ordered that the bill of complaint herein be and it hereby is dismissed.

Dated New York, April 25th, 1923.

Enter.

Martin T. Manton, C. J. Learned Hand, D. J. Jno. C. Knox, D. J.

[fol. 55] [File endorsement omitted.]

[fol. 56] UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR AND ORDER ALLOWING APPEAL—Filed May 1, 1923

To the Honorable Julian W. Mack, U. S. Circuit Judge:

The above named appellant respectfully shows:

That it considers itself aggrieved by the order made and entered in the United States District Court for the Southern District of New York, on the 25th day of April, 1923, in the office of the Clerk of this Court, denying the motion for an injunction pendente lite and dismissing the bill of complaint and does hereby petition for an appeal from said order and decree to the Supreme Court of the United States for the reasons set forth in the assignment of errors herewith and prays that an appeal may be allowed and citation granted and directed to the defendants herein and all other parties in interest, commanding them and each of them to appear before the Supreme Court of the United States.

Dated New York, April 26th, 1923.

Lewis & Fox Company, by David L. Podell, Solicitor for Complainant, Office & P. O. Address 233 Broadway, Borough of Manhattan, New York City.

The foregoing appeal and petition therefor is hereby allowed.
Dated New York, May 1, 1923.

J. W. Mack, U. S. Circuit Judge.

[fol. 57] [File endorsement omitted.]

[fol. 58] UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL—Filed May 1, 1923

SIRS: Please take notice that Lewis & Fox Company, feeling itself aggrieved by the order and decree made and entered herein dated

the 25th day of April, 1923, hereby appeals to the Supreme Court of the United States, to be holden at the Capitol, in the City of Washington, in the District of Columbia, from the said order denying the motion for an injunction pendente lite and dismissing the bill of complaint and from each and every part of said order.

Dated New York, April 26th, 1923.

David L. Podell, Solicitor for Complainant, Office & P. O. Address 233 Broadway, Borough of Manhattan, New York City.

To Samuel H. Hofstadter, Esq., Solicitor for Carl Sherman, as Attorney General of the State of New York, Office & P. O. Address 60 Wall Street, New York City. John Caldwell Myers, Esq., Solicitor for Joab H. Banton, as District Attorney of the County of New York, Office & P. O. Address 32 Franklin Street, New York City.

[fol. 59] [File endorsement omitted.]

[fol. 60] UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed May 1, 1923

Comes now the complainant and files the following Assignment of Errors upon which it relies for its appeal from the decree made by this Honorable Court on the 25th day of April, 1923, in the above entitled action dismissing the complainant's bill and denying to it the relief prayed for.

1. That the Court erred in denying the application for an injunction pendente lite.

2. That the Court erred in dismissing the bill of complaint.

3. That Chapter 580 of the Laws of 1922 is so vague, indefinite and uncertain as to be a violation of the constitutional rights of the complainant under Section I, Article XIV of the Constitution of the United States.

4. That Chapter 581 of the Laws of 1922 is so vague, indefinite and uncertain as to be a violation of the constitutional rights of the complainant under Section I, Article XIV of the Constitution of the United States.

[fol. 61] 5. That Chapter 233 of the Laws of 1915 is so vague, indefinite and uncertain as to be a violation of the constitutional rights of the complainant under Section I, Article XIV of the Constitution of the United States.

6. That Chapter 580 of the Laws of 1922 involves a stigmatization of the complainant's goods and thus destroys their value which is a deprivation of property within the meaning of Section I, Article XIV of the Constitution of the United States.

7. That Chapter 581 of the Laws of 1922 involves a stigmatization of the complainant's goods and thus destroys their value which is a deprivation of property within the meaning of Section I, Article XIV of the Constitution of the United States.

8. That Chapter 580 of the Laws of 1922 denies the complainant the equal protection of the law and is thus in violation of Section I, Article XIV of the Constitution of the United States.

9. That Chapter 581 of the Laws of 1922 denies the complainant the equal protection of the law and is thus in violation of Section I, Article XIV of the Constitution of the United States.

10. That Chapter 233 of the Laws of 1915 denies the complainant the equal protection of the law and is thus in violation of Section I, Article XIV of the Constitution of the United States.

11. That Chapter 580 of the Laws of 1922 imposes an undue and unreasonable burden upon articles which are the subject of Interstate Commerce and is therefore in violation of Section VIII, Article I of the Constitution of the United States.

[fol. 62] 12. That Chapter 581 of the Laws of 1922 imposes an undue and unreasonable burden upon articles which are the subject of Interstate Commerce and is therefore in violation of Section VIII, Article I of the Constitution of the United States.

13. That Chapter 233 of the Laws of 1915 imposes an undue and unreasonable burden upon articles which are the subject of Interstate Commerce and is therefore in violation of Section VIII, Article I of the Constitution of the United States.

In order that the foregoing Assignment of Errors may be and appear of record, the complainant presents the same to the Court, and prays that such disposition be made thereof as in accordance with the laws and the statutes of the United States in such cases provided, and the complainant prays for a reversal of the decretal order and decree of dismissal made and entered by said Court.

David L. Podell, Attorney and Solicitor for Complainant, Office & P. O. Address 233 Broadway, Borough of Manhattan, New York City.

[fol. 63] [File endorsement omitted.]

[fol. 64] CITATION IN USUAL FORM SHOWING SERVICE ON CARL SHERMAN—Filed May 3, 1923, and omitted in printing

[fol. 65] [File endorsement omitted.]

[fol. 66] DISTRICT COURT OF THE UNITED STATES

[Title omitted]

STIPULATION EXTENDING TIME

It is hereby stipulated and agreed by and between the Attorneys for the respective parties hereto that the return day of the Citation in the above entitled case be extended from May 31st, 1923, up to and including June 15th, 1923.

Dated New York, May 29th, 1923.

David L. Podell, Solicitor for Complainant. John Caldwell Myers, Solicitor for District Attorney Joab H. Banton. Samuel Hofstader, Solicitor for Attorney General Carl Sherman.

The foregoing is consented to.
Dated New York, May 31st, 1923.

Alex. Gilchrist, Clerk.

[fols. 67 & 68] BOND ON APPEAL FOR $500—Filed June 1, 1923; omitted in printing

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[fol. 69] UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD—Filed June 1, 1923

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed on by the parties.

Dated May 3rd, 1923.

David L. Podell, Attorney for Complainant. John Caldwell Myers, M. J. E., Attorney for Defendant Joab H. Banton. Samuel H. Hofstadter, Attorney for Defendant Carl Sherman.

[fol. 70] UNITED STATES OF AMERICA

[Title omitted]

CLERK'S CERTIFICATE

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby

certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 2d day of June, in the year of our Lord One Thousand nine hundred and twenty-three and of the Independence of the said United States the one hundred and forty-seventh.

Alex. Gilchrist, Jr., Clerk. (Seal of the District Court of the United States, Southern District of N. Y.)

[fol. 71] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO PARTS OF RECORD TO BE PRINTED—Filed July 14, 1923

Whereas, the affidavits submitted in support of the motion in the case entitled Hygrade Provision Co., Inc., E. Greenebaum Co. Inc., and Guckenheimer & Hess, Inc., Complainants, against, Carl Sherman, as Attorney General of the State of New York, and Joab H. Banton, as District Attorney of the County of New York, Defendants, were the same as those submitted in the case of Lewis & Fox Company, Complainant, against The Same, Defendants, and

Whereas, the one opinion filed by the Court below in the Hygrade Provision Co. case covered the above entitled case,

It is hereby stipulated and agreed by and between the Attorneys for the respective parties hereto that the affidavits submitted in support of the motion, index No. 4, and the affidavits submitted in opposition, index No. 5, and the opinion of the Court, index No. 6, in the case of Hygrade Provision Co. et al., against Carl Sherman and [fol. 72] ano., may be incorporated by reference in the record of Lewis & Fox Company, against, Carl Sherman, and ano., and that the complete text thereof need not be set out in the papers on appeal in the above entitled case.

Dated New York, July 13th, 1923.

David L. Podell, Solicitor for Complainant. Samuel H. Hofstadter, Solicitor for Carl Sherman, as Attorney General. John Caldwell Myers, Solicitor for Joab H. Banton, as District Attorney, per F. C. B.

[fols. 73 & 74] [File endorsements omitted.]

Endorsed on cover: File No. 29,714. S. New York D. C. U. S. Term No. 404. Lewis & Fox Company, appellant, vs. Carl Sherman, as Attorney General of the State of New York, and Joab H. Banton, as District Attorney of the County of New York. Filed June 29th, 1923. File No. 29,714.

(29,715)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 405

HARRY SATZ, APPELLANT,

vs.

CARL SHERMAN, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, AND JOAB H. BANTON, AS DISTRICT ATTORNEY OF THE COUNTY OF NEW YORK

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 19, 1924

[fol. 1] **DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK**

In Equity

HARRY SATZ, Complainant,

against

CARL SHERMAN, as Attorney General of the State of New York, and Joab H. Banton, as District Attorney of the County of New York, Defendants

RULE TO SHOW CAUSE—Filed Feb. 20, 1923

Upon the bill of complaint and affidavit of David L. Podell hereto annexed, duly verified the 12th day of January, 1923, let the defendants and each of them appear at a stated term of this court to be composed of Judges in accordance with Section 266, Judicial Code amended (Section 1243 of the United States Compiled Statutes) to be held at the United States Court House in the Old Post Office Building on the 29th day of January, 1923, at 10:30 A. M. of that day or as soon thereafter as counsel can be heard and show cause why an order should not be made herein enjoining and restraining the defendant Carl Sherman, as Attorney General of the State of New York, and Joab H. Banton as District Attorney of the County of New York, from instituting proceedings of any kind for any act done or committed or omitted by the complainant, its officers and agents, and why the complainant should not have such other and further relief as to the court may seem just and equitable.

Service of a copy of this order on the defendants on or before the 19th day of January, 1923, shall be deemed sufficient.

Dated New York, January 17, 1923.

Jno. C. Knox, U. S. D. J.

[fol. 2] IN UNITED STATES DISTRICT COURT

STATE OF NEW YORK,
County of New York,
City of New York, ss:

AFFIDAVIT OF DAVID L. PODELL

David L. Podell, being duly sworn, deposes and says that he is an attorney-at-law and represents the complainant in the above entitled action. That he has had under consideration Chapters 580 and 581 of the Laws of 1922 of the State of New York which require the labeling for meat products as kosher or nonkosher in a man-

ner more fully set forth in paragraphs Sixth and Seventh of the bill of complaint annexed hereto. The deponent verily believes that the said enactments are void and unconstitutional in that they deprive the complainant of property without due process of law, in violation of Section 1, Article 14 of the Constitution of the United States and deny to the complainant the equal protection of the law, in violation of Section 1, Article 14 of the Constitution of the United States, and unreasonably interfere with the interstate trade and commerce of the complainant, in violation of Section 8, Article 1 of the Constitution of the United States.

That by reason of the fact that a serious question of constitutional law is involved, it is of the utmost importance and of public concern that this application be speedily heard in order that the rights and interests of the parties may be determined. No previous application has been made for this rule to show cause in this suit.

Wherefore, a rule to show cause is sought returnable within 14 days.

DAVID L. PODELL.

Sworn to before me this 12th day of January, 1923. Benjamin S. Kirsh. Benjamin S. Kirsh, Notary Public, New York County, No. 416. Reg. No. 4377. Commission expires March 30th, 1924.

[fol. 3] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

BILL OF COMPLAINT

To the honorable judges of the District Court of the United States for the Southern District of New York:

Harry Satz, brings this, his bill of complaint against Carl Sherman, as Attorney General of the State of New York, and Joab H. Banton, as District Attorney of the County of New York in the State of New York and thereupon your orator complains and says:

First. That for some time last past, he has carried on a general delicatessen and provision supply business which embraces the purchase and sale of various delicatessen and meat products and preparations and is now conducting the same.

Second. Your orator further says that during that time he has invested large amounts of money in building up and thoroughly establishing a large and lucrative trade among his customers in the said commodities and that at the present time there are many hundreds of such customers who are buying and consuming the said

[fol. 4] delicatessen meat prepared and sold by your orator as aforesaid. Your orator's gross annual sales amount to $20,000.

Third. Your orator purchases and sells only such delicatessen and meat preparations for human consumption as are approved under the laws and regulations of the Department of Agriculture and bear the government label or seal as being clean, pure, wholesome, and fit for human food. That any meat or meat commodity, whether raw or prepared, which has not passed a rigid inspection, and which does not receive proper approval under government supervision, or does not bear a government label, is not purchased or sold as food by your orator.

Fourth. That such delicatessen and meat preparations have come to be used very extensively by the public throughout the City of New York, and the good name, good will and trade thus established is of very great value to your orator and far exceeds the sum of $3,000. Your orator has thereby become well and favorably known to the trade and to his customers as producing a desirable wholesome commodity, properly inspected and approved under government supervision, and entirely fit and desirable for human consumption.

Fifth. Your orator further shows: That the Legislature of the State of New York at its 1915 session adopted an Act, known as Subdivision 4 of Sec. 435 of the Penal Law, which was duly approved and went into effect on the 1st day of September, 1915, which law provided as follows:

"A person, who, with intent to defraud, sells or exposes for sale any meat or meat preparation, and falsely represents the same to be kosher, or as having been prepared under and of a product or prod-[fol. 5] ucts sanctioned by the orthodox Hebrew religious requirements; or falsely represents any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon the word 'kosher' in any language, is guilty of a misdemeanor."

Sixth. Your orator further says; That the Legislature of the State of New York, at its 1922 session, passed an Act "to amend the Penal Law in relation to the sale and offering for sale of kosher meat or meat preparations," which Act was approved April 11th, 1922 and became Chapter 580 of the Laws of 1922 of the State of New York. That said Act provides:

"Section 1. The penal law is hereby amended by inserting therein a new section, to follow section four hundred and thirty-five, to be section four hundred and thirty-five-a, to read as follows:

"435-a. Sale of kosher meat and meat preparation.—A person, who, with intent to defraud sells or exposes for sale any meat or meat preparation and falsely represents the same to be kosher, whether such meat or meat preparation be raw or prepared for human consumption, or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements;

or falsely represents any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon the word 'kosher' in any language; or sells or exposes for sale in the same place of business both kosher and non-kosher meat or meat preparations, either raw or prepared for human consumption, who fails to indicate on his window signs and all display advertising, in block letters at least four inches in height 'kosher and nonkosher meat sold here;' or who exposes for sale in any show window or place of business both kosher and nonkosher meat or meat preparation, either raw or prepared for human con-
[fol. 6] sumption, who fails to display over each kind of meat or meat preparation so exposed a sign in block letters at least four inches in height reading 'kosher meat,' 'nonkosher meat,' as the same may be, is guilty of a misdemeanor,

Sec. 2. This act shall take effect September first, nineteen hundred and twenty-two."

Seventh. Your orator further shows: That the Legislature of the State of New York, at its 1922 session, passed an Act to amend the Penal Law in relation to the sale of kosher meat or meat preparations, which Act was approved on April 11th, 1922, and thereupon became Chapter 581 of the Laws of 1922 of the State of New York. That said Act provides:

"Section 1. Subdivision four of section four hundred and thirty-five of the penal law is hereby amended to read as follows:

"4. Sells or exposes for sale any meat or meat preparation and falsely represents the same to be kosher, or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements; or falsely represents any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon the word 'kosher' in any language; or sells or exposes for sale in the same place of business both kosher and nonkosher meat or meat preparations who fails to indicate on his window signs and all display advertising, in block letters at least four inches in height, 'kosher and nonkosher meat sold here'; or who exposes for sale in any show window or place of business both kosher and nonkosher meat or meat products who fails to display over such meat or meat preparation so exposed a sign in block letters at least four inches in height reading 'kosher meat,' or 'nonkosher meat,' as the case may be.

[fol. 7] Sec. 2. This act shall take effect immediately.

Eighth. And your orator further shows: That the phrase "orthodox Hebrew religious requirements," as used in all of the above enactments, is vague, indefinite, uncertain and incapable of correct and common definition.

Ninth. Your orator further shows: That the said term "kosher" used in all of said enactments is a word of the Hebrew language, and is likewise vague, indefinite uncertain, and incapable of correct and common definition. That its meaning is essentially based upon the phrase "orthodox Hebrew religious requirements."

Tenth. And your orator further shows: That where used in a strictly Hebrew religious sense, the term "kosher" may be described as clean, fit, proper, according to the orthodox Hebrew religious requirements, and the term "not kosher" may be described as meaning unclean, unfit, and improper according to the orthodox Hebrew religious requirements.

Eleventh. Your orator is advised by his counsel, and *therefrom* avers, that under the amendments above set forth, any delicatessen owner who sells both kosher and nonkosher meat commodities in his premises will be obligated to determine which of said products are kosher and which are not kosher, and likewise will be obligated to label or post a sign in four inch block letters upon all such commodities exposed for sale in the same place of business identifying such individual packages as kosher or not kosher, whichever the case may be. That all such delicatessen owners who sell both kosher and [fol. 8] nonkosher meats will be required to post a sign upon their windows, or show windows, or in their display advertising, announcing that both kosher and nonkosher meats are sold in the said premises.

Twelfth. Your orator is further advised and therefore avers, that the defendant Carl Sherman is Attorney General of the State of New York, and therefore the prosecuting officer for the said State, and the defendant Joab H. Banton is the District Attorney for the County of New York, and therefore the prosecuting officer for the said County, and that the said defendants have threatened to prosecute all complaints against persons or concerns engaged as dealers, delicatessen owners, butchers, or otherwise in the sale of raw or prepared meat commodities, who are charged with violating the provisions of the statutes hereinbefore referred to.

Your orator further shows that by reason of the aforesaid threats of prosecution on the part of the defendants herein, and by reason of the fear inspired by the enactments and by the requirements of the above laws, your orator when called upon at his peril to determine whether any meats or meat products are kosher or not kosher and to label the same in accordance with the requirements of the statute herein set forth, has decided and will continue to decide that the products sold by your complainant are not kosher, to the great detriment and injury of your orator's good will and established trade. That such determination and decision on the part of your orator has been and will be entirely induced by the fear that some Judge or jury might determine that the Jewish Law or the [fol. 9] customs, traditions, and precedents of the orthodox Hebrew religious requirements necessitate that such meat as your orator sells as kosher are not kosher. That as your orator has fully set forth above, any such meat or meat products as are sold from your orator's premises with a label "kosher" thereon are according to the best information and belief of your orator prepared in strict accordance with what your orator honestly believes to be the orthodox Hebrew religious requirements in so far as it is humanly possible for your orator to determine what such requirements are. In any event, your

orator alleges all the meats sold and shipped from your orator's place of business are clean, wholesome, proper food commodities, carefully inspected and eminently fit and desirable for human consumption,

Thirteenth. Your orator further shows: That by reason thereof he will be irreparably damaged in serious loss, destruction, and interference with his trade and good will and with his name and business reputation, in excess of $3,000. That he will likewise be irreparably damaged in the deprivation and loss of numbers of his customers. That the sales made by your orator will thereby be substantially lessened and decreased. That his good will will, in course of time, be destroyed. That his investment of many thousands of dollars in his plant and in his equipment and his other property, real and personal, of the kind utilized in the conduct of his business will be substantially diminished in value, if not rendered of no value at all.

[fol. 10] Fourteenth. And your orator further shows: That as your orator is advised and verily believes, more than sixty per cent of the delicatessen goods and meat preparations consumed within the borders of the State of New York comes and is derived from provision houses in States other than the State of New York. That as your orator is advised and verily believes, more than sixty per cent of the delicatessen and meat preparations consumed within the State of New York is manufactured in and prepared in states other than the State of New York. That in short, the vast bulk of the delicatessen and meat products consumed by the inhabitants and residents of the State of New York must be brought in from outside of said State, from other States of the Union.

Fifteenth. Your orator further shows: That he purchases from packers, provision manufacturers and dealers situated in States other than the State of New York, more than $3,000.00 worth of meats every year. That your orator sells within the City of New York as well as other points within the State of New York such meat and meat products in their original unbroken packages.

Sixteenth. Your orator further shows: That unless restrained and enjoined by the order of this Court, said defendants, in their efforts to enforce the foregoing enactments will continue to threaten prosecutions of your orator and all others who do not comply with the foregoing provisions of the statute complained of and will intimidate and annoy your orator and interfere with and prevent him from selling the delicatessen goods and meat products within the County [fol. 11] of New York and that their course will be followed by other prosecuting attorneys within the State of New York, who will likewise threaten and procure prosecutions of your orator and the inevitable effect thereof will be to interfere and obstruct your orator in the conduct of his business, causing him great financial loss, interfering with his property rights in the said delicatessen and meat preparations and with his right to sell the same freely and will thereby inflict great and irreparable injury upon your orator

which it will be impossible to compensate in damages or accurately to ascertain and for which there is no adequate legal remedy. That your orator has already discontinued purchasing meats and meat preparations from certain packers, provision manufacturers, and dealers because of fear of criminal prosecution induced by the threats of defendants as aforesaid, that prosecutions will follow if meats are not properly labeled in accordance with the statutes complained of and your orator fears that if he erroneously labels said meat and delicatessen products and preparations he will expose himself to criminal prosecution.

Seventeenth. And your orator further shows: That the irreparable injury to and destruction of the property and property rights and the trade and good will of your orator's customers, as above set forth, deprive your orator of his property without due process of law in violation of Section 1, Article 14 of the Constitution of the United States.

Eighteenth. And your orator further avers: Said acts of the Legislature of the State of New York, fully above set forth, are void because contrary to and in violation of so much of Section 1, Article [fol. 12] 14 of the Constitution of the United States as provides that no state shall deprive any person of life, liberty, or property without due process of law, or deny to any person within its jurisdiction the equal protection of the law.

Nineteenth. And your orator further shows: That said enactments fully above set forth are also in violation of so much of Section 8 of Article 1 of the Constitution of the United States as confers upon the Congress of the United States the power to "regulate commerce with foreign nations and among the several states and with the Indian tribes", and in that said act and each of said sections will, if enforced, unreasonably interfere with commerce between the several states, and will, as heretofore alleged, interrupt and destroy the interstate commerce in which your complainant alleges he is largely engaged as aforesaid.

Twentieth. And your orator further shows: That unless a temporary injunction is issued in this cause prohibiting and restraining the defendants from doing any of the acts complained of herein pending a suit and until a final hearing thereof, said defendants will, before such final hearing, have consummated and accomplished said acts or threatened acts in whole or in part, and will have seriously interfered with and substantially destroyed plaintiff's said business and good will, thereby rendering any relief which the Court might otherwise grant upon a final hearing ineffective and of no avail.

Twenty-first. And your orator further shows: That unless re- [fol. 13] strained by an order of this Court, said defendants, will, before the hearing can be had upon said application for an injunction, proceed to prosecute the said alleged violators of the said law, and that other prosecuting attorneys within the State of New York

will follow a similar course, and before such temporary hearing can be had upon notice, will cause arrest to be made of your orator and thereby greatly and irreparably injure and disorganize your orator's said business within the State of New York.

Now, therefore, the premises being considered, may it please the Court to grant unto your orator a write of subpœna commanding the defendants at a day therein to be inserted, to be and appear before this Honorable Court, there to answer without oath (their oaths being hereby expressly waived), all and singular of the premises, and to do and abide by such order and decree as this Honorable Court shall make therein; and until a final hearing of said cause, for as much as by reason of the premises the defendants will, unless restrained by order of this Court, take such action in the premises as will greatly injure and destroy the rights of your orator before a final hearing can be had upon the merits of this cause; and your orator further prays that your Honors will, pending said final hearing, grant a temporary injunction at such time as your Honors shall designate, restraining and forbidding the defendants, their agents, assistants, and attorneys from taking any action in the premises or from instituting any proceeding against your orator, his employees, agents, or representatives, or customers, for any alleged failure to comply with the requirements of said enactments, and enjoining and prohibiting the said defendant, during the pendency [fol. 14] of this suit and until the final hearing and determination thereof, from making any threats of prosecuting or from conducting any prosecutions of any and all persons by reason of their failure to label any of the meats sold by your orator as "not kosher," or by reason of their failure to exhibit a four inch block letter sign or any sign upon the meats or meat products sold by your orator bearing the words "not kosher," or from in any manner interfering or seeking to prevent the full, free, and unhampered sale of the products of your orator within the State of New York without labeling or designating the same as "not kosher," and from injuring the business of your orator by compelling it to be discredited in standing and reputation, and by having its merchandise branded as "nonkosher," in accordance with the requirements of said enactments.

And will your Honors grant unto your orator all such further relief as may be just and equitable in the premises.

David L. Podell, Solicitor for Complainant.

[fol. 15] Jurat showing the foregoing was duly sworn to by Harry Satz omitted in printing.

[fol. 16] STATE OF NEW YORK,
County of New York,
City of New York, ss:

AFFIDAVIT OF DAVID L. PODELL

David L. Podell, being duly sworn, deposes and says that he is an attorney-at-law and represents the complainant in the above entitled action. That he has had under consideration Chapters 580 and 581 of the Laws of 1922 of the State of New York which require the labeling of meat products as kosher or nonkosher in a manner more fully set forth in paragraphs Sixth and Seventh of the bill of complaint annexed hereto. The deponent verily believes that the said enactments are void and unconstitutional in that they deprive the complainant of property without due process of law, in violation of Section 1, Article 14 of the Constitution of the United States and deny to the complainant the equal protection of the law, in violation of Section 1, Article 14 of the Constitution of the United States, and unreasonably interfere with the interstate trade and commerce of the complainant, in violation of Section 8, Article 1 of the Constitution of the United States.

That by reason of the fact that a serious question of constitutional law is involved, it is of the utmost importance and of public concern that this application be speedily hear- in order that the rights and interests of the parties may be determined. No previous application has been made for this rule to show cause in this suit.

Wherefore, a rule to show cause is sought returnable within — days.

—— ——.

Sworn to before me this — day of ——, 1923. —— ——.

[fol. 16½] [File endorsement omitted.]

[fol. 17] DISTRICT COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AMENDING BILL—Filed Feb. 24, 1923

It is hereby stipulated and agreed that the paragraph marked "First" in the case entitled Harry Satz vs. Carl Sherman, et al., be amended so as to read as follows:

"First. That for some time last past he has carried on within the City of New York a general delicatessen and provision supply business which embraces the purchase and sale of various delicatessen and meat products and preparations, which to your orator's honest information and belief are kosher, and is now conducting the same."

It is further stipulated and agreed that any notices, papers, exhibits and affidavits submitted in any one of the suits above named shall be deemed to be before the Court in all of the said suits.

Dated New York, February 19, 1923.

David L. Podell, Solicitor for Complainant. Carl Sherman, as Attorney General, etc., By Samuel Hofstadter, Solicitor for Carl Sherman, etc. John Caldwell Myers, Solicitor for Joab H. Banton, etc.

[fol. 18] District Court of the United States, Southern District of New York

[Title omitted]

Notice of Motion—Filed Feb. 14, 1923

Sirs: Please take notice that the motion to dismiss the bill of complaint herein has this day been filed in the District Court of the United States for the Southern District of New York, in the office of the Clerk of the said Court, and that the said motion will be set down for hearing and brought on for argument at a term of the said Court, constituted pursuant to §266 of the Judicial Code, to be held at the Old Post Office in the City and County of New York, Southern District of New York, on the 19th day of February, 1923, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Dated New York, February 13, 1923.

Yours, etc., Carl Sherman, Attorney General of the State of New York. Samuel H. Hofstadter, Solicitor for Defendant Carl Sherman, as Attorney General of the State of New York, 60 Wall Street, New York City.

To Podell, Ansorge & Podell, Esqrs., Solicitors for Complainant, 233 Broadway, New York City.

[fol. 19] District Court of the United States

[Title omitted]

Motion to Dismiss Bill of Complaint

Now comes the defendant, Carl Sherman as Attorney General of the State of New York, and upon the bill of complaint herein moves that the said bill of complaint be dismissed for the following reasons and upon the following grounds, to wit:

I. That it appears upon the face of the bill of complaint that the facts stated therein are insufficient to constitute a cause of action in equity.

II. That it appears upon the face of the bill of complaint that the complainant has a plain, adequate and complete remedy at law.

III. That it does not appear upon the face of the bill of complaint, and no sufficient facts are averred therein to show, that the intervention of a court of equity and the assumption of jurisdiction by such a court is necessary or essential in order to effectually protect the property or rights of property of the complainant from great and irreparable injury or from any injury whatsoever.

[fol. 20] IV. That Chapter 233 of the Laws of 1915, as amended by Chapter 581 of the New York Laws of 1922 (Penal Law, §435, subd. 4) is a valid statute, duly passed by the Legislature of the State of New York, in the due exercise of its lawful and constitutional powers and does not violate any of the provisions of either Article 1, §8 of the Constitution of the United States or the Fourteenth Amendment to such Constitution; and it does not appear from the face of the bill of complaint or from the facts averred therein that the said statute, or the enforcement thereof by the State of New York by and through its governmental and administrative agencies, operates or will operate to deprive or deny the complainant of the equal protection of the laws, or to deprive him of liberty or of any property or rights of property without due process of law.

V. That Chapter 580 of the New York Laws of 1922 (Penal Law §435-a) is a valid statute, duly passed by the Legislature of the State of New York, in the due exercise of its lawful and constitutional powers and does not violate any of the provisions of either Article I, §8 of the Constitution of the United States or the Fourteenth Amendment to such Constitution; and it does not appear from the face of the bill of complaint or from the facts averred therein that the said statute, or the enforcement thereof by the State of New York by and through the governmental and administrative agencies, operates or will operate to deprive or deny the complainant of the equal protection of the laws, or to deprive him of liberty or of any property or rights of property without due process of law.

[fol. 21] VI. That it appears upon the face of the bill of complaint that to grant the relief sought by the complainant would constitute an unlawful and unconstitutional interference by the agencies of the Government of the United States with the lawful and constitutional power, right and duty of the State of New York and its governmental agencies (including the Attorney General of the State of New York) to prosecute violations of criminal statutes of the State of New York.

VII. That it appears on the face of the bill of complaint that the complainant is not within the class of persons who are or may be injured by the alleged unconstitutionality of the provisions of the statutes set forth in the bill of complaint.

VIII. That it appears upon the face of the bill of complaint that this court is without power or authority to grant the relief or to render the judgment and decree prayed for.

IX. That no sufficient facts are alleged in the bill of complaint to warrant or justify the granting of the relief prayed for or any other equitable relief.

Wherefore, for the reasons and upon the grounds aforesaid, the defendant, Carl Sherman, as Attorney General of the State of New York, respectfully moves this Court that the bill of complaint herein [fol. 22] be dismissed as to him.

Dated New York, February 8th, 1923.

Carl Sherman, Attorney General of the State of New York. Samuel H. Hofstadter, Solicitor for Defendant Carl Sherman, as Attorney General of the State of New York, No. 60 Wall Street, New York City.

[fol. 23] [File endorsement omitted.]

[fol. 24] DISTRICT COURT OF THE UNITED STATES

[Title omitted]

NOTICE OF MOTION—Filed March 26, 1923

SIRS: Please take notice that the annexed motion to dismiss the bill of complaint herein has this day been filed in the District Court of the United States for the Southern District of New York in the office of the Clerk of the said Court, and that the said motion will be set down for hearing and brought on for argument at a term of the said Court, constituted pursuant to §266 of the Judicial Code, to be held at the Old Post Office in the City and County of New York, Southern District of New York, on the 19th day of February 1923, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard.

Dated New York, February 14, 1923.

Yours, etc., Joab H. Banton, District Attorney in and for the County of New York. John Caldwell Myers, Solicitor for Defendant Joab H. Banton.

To Messrs. Podell, Ansorge & Podell, Solicitors for Complainant, 233 Broadway, New York, N. Y.

[fol. 25] DISTRICT COURT OF THE UNITED STATES

[Title omitted]

MOTION TO DISMISS BILL OF COMPLAINT

Now comes the defendant, Joab H. Banton, as District Attorney of the County of New York, and upon the bill of complaint herein moves that the said bill of complaint be dismissed for the following reasons and upon the following grounds, to wit:

1. That it appears upon the face of the bill of complaint that the facts stated therein are insufficient to constitute a cause of action in equity.

2. That it appears upon the face of the bill of complaint that the complainant has a plain, adequate and complete remedy at law.

3. That it does not appear upon the face of the bill of complaint, and no sufficient facts are averred therein to show, that the intervention of a court of equity and the assumption of jurisdiction by such a court is necessary or essential in order to effectually protect the property or rights or property of the complainant from great and irreparable injury or from any injury whatsoever.

[fol. 26] 4. That it appears on the face of the bill of complaint that the complainant is not within the class of persons who are or may be injured by the alleged unconstitutionality of the provisions of the statutes set forth in the bill of complaint.

5. That Chapter 233 of the Laws of 1915, as amended by Chapter 581 of the New York Laws of 1922 (Penal Law, §435, subd. 4) is a valid statute, duly passed by the Legislature of the State of New York, in the due exercise of its lawful and constitutional powers and does not violate any of the provisions of either Article I, §8 of the Constitution of the United States or the Fourteenth Amendment to such Constitution; and it does not appear upon the face of the bill of complaint or from the facts averred therein that the said statute, or the enforcement thereof by the State of New York by and through its governmental and administrative agencies, operates or will operate to interfere unwarrantably with commerce between the several states, or to deprive or deny the complainants of the equal protection of the laws, or to deprive him of liberty or of any property or rights of property without due process of law.

6. That Chapter 580 of the New York Laws of 1922 (Penal Law §435-a) is a valid statute, duly passed by the Legislature of the State of New York, in the due exercise of its lawful and constitutional powers and does not violate any of the provisions of either Article I, §8 of the Constitution of the United States or the Fourteenth Amendment to such Constitution; and it does not appear upon the face of the bill of complaint or from the facts averred therein that the said statute, or the enforcement thereof by the

State of New York by and through the governmental and administrative agencies, operates or will operate to interfere unwar- [fol. 27] rantably with commerce between the several states, or to deprive or deny the complainant of the equal protection of the laws, or to deprive him of liberty or of any property or rights of property without due process of law.

7. That it appears upon the face of the bill of complaint that to grant the relief sought by the complainant would constitute an unlawful and unconstitutional interference by the agencies of the Government of the United States with the lawful and constitutional power, right and duty of the State of New York and its governmental agencies (including the District Attorney of the County of New York) to prosecute violations of criminal statutes of the State of New York.

8. That it appears upon the face of the bill of complaint that this court is without power or authority to grant the relief or to render the judgment and decree prayed for.

9. That no sufficient facts are alleged in the bill of complaint to warrant or justify the granting of the relief prayed for or any other equitable relief.

Wherefore, for the reasons and upon the grounds aforesaid, the defendant, Joab H. Banton, as District Attorney of the County of New York, respectfully moves this Court that the bill of complaint herein be dismissed as to him.

Dated February 14, 1923.

Joab H. Banton, District Attorney of the County of New York. John Caldwell Myers, Solicitor for Defendant Joab H. Banton, as District Attorney of the County of New York, 32 Franklin Street, New York, N. Y.

[fols. 28–50] [File endorsement omitted.]

[fol. 51] UNITED STATES DISTRICT COURT

[Title omitted]

ORDER DENYING INJUNCTION AND DISMISSING BILL—Filed April 25, 1923

This cause having come on to be heard on the order to show cause why a preliminary injunction should not issue as prayed for in the bill of complaint and on the motion made by the respective defendants to dismiss the bill of complaint, and the Court having heard the arguments of David L. Podell, Esq., Solicitor for the complainant, Samuel H. Hofstadter, Esq., Solicitor for the defendant

Carl Sherman, as Attorney General of the State of New York, and John Caldwell Myers, Esq., Solicitor for the defendant Joab H. Banton, District Attorney of New York County, and due deliberation having been had, it is

Ordered that the motion for an injunction pendente lite be and it hereby is denied; and it is

Further ordered that the bill of complaint herein be and it hereby is dismissed.

Dated New York, April 25, 1923.

Enter.

Martin T. Mantor, C. J. Learned Hand, D. J. Jno. C. Knox, D. J.

[fol. 52] [File endorsement omitted.]

[fol. 53] UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR AND ORDER ALLOWING APPEAL

To the Honorable Julian W. Mack, U. S. Circuit Judge:

The above named appellant respectfully shows:

That he considers himself aggrieved by the order made and entered in the United States District Court for the Southern District of New York, on the 25th day of April, 1923, in the office of the Clerk of this Court, denying the motion for an injunction pendente lite and dismissing the bill of complaint and does hereby petition for an appeal from said order and decree to the Supreme Court of the United States for the reasons set forth in the assignment of errors herewith and prays that an appeal may be allowed and citation granted and directed to the defendants herein and all other parties in interest, commanding them and each of them to appear before the Supreme Court of the United States.

Dated New York, April 26th, 1923.

Harry Satz, by David L. Podell, Solicitor for Complainant, Office & P. O. Address 233 Broadway, Borough of Manhattan, New York City.

The foregoing appeal and petition therefor is hereby allowed.

Dated New York, May 1, 1923.

J. W. Mack, U. S. Circuit Judge.

[fol. 54] [File endorsement omitted.]

[fol. 55] UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL—Filed May 1, 1923

SIRS: Please take notice that Harry Satz feeling himself aggrieved by the order and decree made and entered herein dated the 25th day of April, 1923, hereby appeals to the Supreme Court of the United States, to be holden at the Capitol, in the City of Washington, in the District of Columbia, from the said order denying the motion for an injunction pendente lite and dismissing the bill of complaint and from each and every part of said order.

Dated New York, April 26th, 1923.

David L. Podell, Solicitor for Complainant, Office & P. O. Address 233 Broadway, Borough of Manhattan, New York City.

To Samuel H. Hofstadter, Esq., Solicitor for Carl Sherman, as Attorney General of the State of New York, Office & P. O. Address, 60 Wall Street, New York City; John Caldwell Myers, Esq., Solicitor for Joab H. Banton, as District Attorney of the County of New York, Office & P. O. Address 32 Franklin Street, New York City.

[fol. 56] [File endorsement omitted.]

[fol. 57] UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed May 1, 1923

Comes now the complainant and files the following Assignment of Errors upon which he relies for his appeal from the decree made by this Honorable Court on the 25th day of April, 1923, in the above entitled action dismissing the complainant's bill and denying to him the relief prayed for.

1. That the Court erred in denying the application for an injunction pendente lite.

2. That the Court erred in dismissing the bill of complaint.

3. That Chapter 580 of the Laws of 1922 is so vague, indefinite and uncertain as to be a violation of the constitutional rights of the complainant under Section I, Article XIV of the Constitution of the United States.

4. That Chapter 581 of the Laws of 1922 is so vague, indefinite and uncertain as to be a violation of the constitutional rights of

the complainant under section I, Article XIV, of the Constitution of the United States.

[fol. 58] 5. That Chapter 233 of the Laws of 1915 is so vague, indefinite and uncertain as to be a violation of the constitutional rights of the complainant under Section I, Article XIV of the Constitution of the United States.

6. That Chapter 580 of the Laws of 1922 involves a stigmatization of the complainant's goods and thus destroys their value which is a deprivation of property within the meaning of Section I, Article XIV of the Constitution of the United States.

7. That Chapter 581 of the Laws of 1922 involves a stigmatization of the complainant's goods and thus destroys their value which is a deprivation of property within the meaning of Section I, Article XIV of the Constitution of the United States.

8. That Chapter 580 of the Laws of 1922 denies the complainant the equal protection of the law and is thus in violation of Section I, Article XIV of the Constitution of the United States.

9. That Chapter 581 of the Laws of 1922 denies the complainant the equal protection of the law and is thus in violation of Section I, Article XIV of the Constitution of the United States.

10. That Chapter 233 of the Laws of 1915 denies the complainant the equal protection of the law and is thus in violation of Section I, Article XIV of the Constitution of the United States.

11. That Chapter 580 of the Laws of 1922 imposes an undue and unreasonable burden upon articles which are the subject of Interstate Commerce and is therefore in violation of Section VIII, Article I of the Constitution of the United States.

[fol. 59] 12. That Chapter 581 of the Laws of 1922 imposes an undue and unreasonable burden upon articles which are the subject of Interstate Commerce and is therefore in violation of Section VIII, Article I of the Constitution of the United States.

13. That Chapter 233 of the Laws of 1915 imposes an undue and unreasonable burden upon articles which are the subject of Interstate Commerce and is therefore in violation of Section VIII, Article I of the Constitution of the United States.

In order that the foregoing Assignment of Errors may be and appear of record, the complainant presents the same to the Court, and prays that such disposition be made thereof as in accordance with the laws and the statutes of the United States in such cases provided, and the complainant prays for a reversal of the decretal order and decree of dismissal made and entered by said Court.

David L. Podell, Attorney and Solicitor for Complainant, Office & P. O. Address 233 Broadway, Borough of Manhattan, New York City.

[fol. 60] [File endorsement omitted.]

[fol. 61] CITATION IN USUAL FORM SHOWING SERVICE ON CARL SHERMAN—Filed May 3, 1923; omitted in printing

[fol. 62] [File endorsement omitted.]

[fol. 63] DISTRICT COURT OF THE UNITED STATES

[Title omitted]

STIPULATION EXTENDING TIME—Filed June 1, 1923

It is hereby stipulated and agreed by and between the Attorneys for the respective parties hereto that the return day of the Citation in the above entitled case be extended from May 31st, 1923, up to and including June 15th, 1923.

Dated New York, May 29th, 1923.

David L. Podell, Solicitor for Complainant. John Caldwell Myers, Solicitor for District Attorney Joab H. Banton. Samuel Hofstader, Solicitor for Attorney General Carl Sherman.

The foregoing is consented to.
Dated New York, May 31st, 1923.

Alex. Gilchrist, Clerk.

[fols. 64 & 65] BOND ON APPEAL FOR $500—Filed June 1, 1923; omitted in printing

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[fol. 66] UNITED STATES DISTRICT COURT

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated May 3rd, 1923.

David L. Podell, Attorney for Complainant. John Caldwell Myers, Attorney for Defendant Joab H. Banton. Samuel H. Hofstadter, Attorney for Defendant Carl Sherman.

[fol. 67] UNITED STATES OF AMERICA:

[Title omitted]

CLERK'S CERTIFICATE

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 2d day of June, in the year of our Lord one thousand nine hundred and twenty-three and of the Independence of the said United States the one hundred and forty-seventh.

Alex. Gilchrist, Jr., Clerk. (Seal of District Court of the United States, Southern District of N. Y.)

[fol. 68] SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO PARTS OF RECORD TO BE PRINTED—Filed July 14, 1923

Whereas, the affidavits submitted in support of the motion in the case entitled Hygrade Provision Co., Inc., E. Greenebaum Co. Inc., and Guckenheimer & Hess, Inc., Complainants, against, Carl Sherman, as Attorney General of the State of New York, and Joab H. Banton, as District Attorney of the County of New York, Defendants, were the same as those submitted in the case of Harry Satz, Complainant, against, the same, Defendants, and

Whereas, the one opinion filed by the Court below in the Hygrade Provision Co. case covered the above entitled case,

It is hereby stipulated and agreed by and between the Attorneys for the respective parties hereto that the affidavits submitted in support of the motion, index No. 4, and the affidavits submitted in opposition, index No. 5, and the opinion of the Court, index No. 6, in the case of Hygrade Provision Co. et al., against Carl Sherman and [fol. 69] ano., may be incorporated by reference in the record of Harry Satz against Carl Sherman and ano., and that the complete

text thereof need not be set out in the papers on appeal in the above entitled case.

Dated New York, July 13th, 1923.

David L. Podell, Solicitor for Complainant. Samuel H. Hofstadter, Solicitor for Carl Sherman, as Attorney General. John Caldwell Myers, Solicitor for Joab H. Baton, as District Attorney, per F. B.

[fols. 70 & 71] [File endorsements omitted.]

Endorsed on cover: File No. 29,715. S. New York D. C. U. S. Term No. 405. Harry Satz, appellant, vs. Carl Sherman, as Attorney General of the State of New York, and Joab H. Banton, as District Attorney of the County of New York. Filed June 29th, 1923. File No. 29,715.

(8)

FILED
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WM. R. STA

Argued by
DAVID L. PODELL.

Supreme Court of the United States

OCTOBER TERM, 1924.

Nos. 104, 105, 106.

HYGRADE PROVISION CO., INC., E. GREENEBAUM CO., INC., and GUCKENHEIMER & HESS, INC.,
Appellants,

—against—

CARL SHERMAN, as Attorney General of the State of New York, and JOAB H. BANTON, as District Attorney of the County of New York,
Appellees.

LEWIS & FOX COMPANY,
Appellants,

—against—
THE SAME,
Appellees.

HARRY SATZ,
Appellant,

—against—
THE SAME,
Appellees.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLANTS.

DAVID L. PODELL,
Attorney for Appellants.

DAVID L. PODELL,
BENJAMIN S. KIRSH,
Of Counsel.

INDEX.

TABLE OF CASES.

Supreme Court of the United States

HYGRADE PROVISION CO., INC., E. GREENEBAUM CO., INC. and GUCKENHEIMER & HESS, INC., Appellants, —against— CARL SHERMAN, as Attorney General of the State of New York, and JOAB H. BANTON, as District Attorney of the County of New York, Appellees.	No. 104.
LEWIS & FOX COMPANY, Appellants, —against— THE SAME, Appellees.	No. 105.
HARRY SATZ, Appellant. —against— THE SAME, Appellees.	No. 106.

PRELIMINARY STATEMENT.

These cases present for consideration the constitutionality of Chapters 580 and 581 of the Laws of 1922, enacted by the New York State Legislature. They arise on appeals from decrees of the Statutory Court, organized pursuant to Section 266 of the Judicial Code, denying the applications for preliminary injunctions and granting the motions to dismiss the bills of complaint. Chapter 580 has been incorporated in the Penal Law and is

known as Section 435a. Chapter 581 amends and takes the place of subdivision 4 of Section 435 of the Penal Law.

The Court will note that Chapter 580 is a separate and independent section, and is not a subdivision of any pre-existing statute, whereas Chapter 581 is known and designated as subdivision 4 of Section 435 of the Penal Law. The material portion of Chapter 581 reads, as follows:

(A person, who, with intent to defraud):

> * * * "4. Sells or exposes for sale any meat or meat preparation and falsely represents the same to be kosher, or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements; or falsely represents any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon the word 'kosher' in any language; or sells or exposes for sale in the same place of business both kosher and non-kosher meat or meat preparations who fails to indicate on his window signs and all display advertising, in block letters at least four inches in height, 'kosher and non-kosher meat sold here'; or who exposes for sale in any show window or place of business both who fails to display over such meat or meat kosher and nonkosher meat or meat products preparation so exposed a sign in block letters at least four inches in height reading 'kosher meat', or 'nonkosher meat,' as the case may be, * * *"
>
> (Is guilty of a misdemeanor).

(There is a further provision in the original chapter that it shall take effect immediately).

The material portion of Chapter 580 reads as follows:

"A person, who, with intent to defraud sells or exposes for sale any meat or meat preparation and falsely represents the same to be kosher, whether such meat or meat preparation be raw or prepared for human consumption, or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements; or falsely represents any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon the word 'kosher' in any language; or sells or exposes for sale in the same place of business both kosher and nonkosher meat or meat preparations, either raw or prepared for human consumption, who fails to indicate on his window signs and all display advertising, in block letters at least four inches in height, 'kosher and nonkosher meat sold here'; or who exposes for sale in any show window or place of business both kosher and nonkosher meat or meat preparations, either raw or prepared for human consumption, who fails to display over each kind of meat or meat preparation so exposed a sign in block letters at least four inches in height reading 'kosher meat,' or 'nonkosher meat,' as the case might be, is guilty of a misdemeanor."

(There is a further provision in the original chapter that it shall take effect September 1st, 1922.)

These two sections constitute amendments and amplifications of the pre-existing subdivision 4 of the same section of the Penal Law, which had been enacted in 1915 and which provided as follows:

(A person, who, with intent to defraud):

"Orthodox Hebrew requirements"

> * * * "4. Sells or exposes for sale any meat or meat preparation and falsely represents the same to be kosher, or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements; or falsely represents any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon the word 'kosher' in any language" (Is guilty of a misdemeanor).

The grounds urged for the unconstitutionality of these enactments are as follows:

1. The standard of criminality established by these statutes is based upon a finding of fact by a jury of a body of law *wholly foreign* to the common law and our system of jurisprudence.

2 There is nowhere in any of the statutes a definition, limitation, or explanation of the word "kosher" or the term "orthodox Hebrew religious requirements."

3. The positive obligation under these statutes to indicate on window signs and display advertising, and also to display over each meat or meat preparation, the term "nonkosher," attaches and carries with it an unnecessary and unjustifiable stigma against pure food, with the resulting implication of uncleanliness, unwholesomeness, and undesirability.

4. The appellants herein are being deprived of life, liberty, and property without due process of law in violation of the 14th amendment in that their lawful business is being burdened and destroyed

with arbitrary, unreasonable, and impossible restrictions.

5. The appellants herein are likewise being denied the equal protection of the laws in violation of the 14th amendment in that they are being arbitrarily singled out and discriminated against by this legislation by reason of these unreasonable, onerous, and oppressive restrictions.

6. These statutes are further in violation of the commerce clause of the Constitution of the United States, in that they impose unreasonable, arbitrary, and oppressive burdens upon the interstate business of the appellants.

7. There is a further objection to Chapter 580 on the ground that it eliminates as an ingredient of criminality the intent to defraud, and makes an honest mistake in a vague, uncertain, and indefinite field of knowledge, a crime punishable by imprisonment.

THE FACTS.

The case entitled *Hygrade Provision Co., Inc., E. Greenebaum Co., Inc., and Guckenheimer & Hess, Inc. vs. The Attorney General and the District Attorney of the State of New York*, is brought in behalf of provision manufacturers who have places of business within the City of New York and who are under duty to label their meats in accordance with the provisions of the Statutes. Their products are sold also in states other than the State of New York, in their original packages. The *Lewis & Fox* case is brought in behalf of a foreign corporation, which has its meat products resold in their original packages within the

State of New York. The *Harry Satz* case involves the constitutionality of the statutes in so far as they affect a delicatessen man, who is under duty to label his meats with the above signs and notices. In each case, the complainants set forth that they have invested large amounts of money in building up and establishing an extensive business and valuable good will, which in the case of each complainant far exceeds the sum of $3,000. *They have sold delicatessen and meat preparations which are approved under the laws and regulations of the Department of Agriculture, and bear Government labels as being clean, pure, wholesome food.* Such meats are, according to the honest belief of the complainants, kosher, so far as the complainants have been able to ascertain.

The bills of complaint then allege the passage of the original subdivision 4 of Section 435 of the Penal Law, which is the unamended section of the so-called Kosher Laws. The bills then allege the enactment of Chapters 580 and 581 of the Laws of 1922. Under both of these chapters any person, who sells or exposes for sale in the same place of business both kosher and nonkosher meat or meat preparations, must indicate on his window, signs and all display advertising in block letters of at least four inches in height that kosher and nonkosher meats are sold there; or who exposes for sale in any show window or his place of business both kosher and nonkosher meat or meat preparations, must display over each kind of meat or meat preparation so exposed, a sign in block letters at least four inches in height reading "kosher meat or nonkosher meat," as the case may be.

The phrase "orthodox Hebrew religious requirements" and the term "kosher" are vague, indefinite, uncertain, and incapable of correct and common

definition. The term "kosher" may be described as meaning clean, fit, proper, according to the orthodox Hebrew religious requirements, and the term "nonkosher" has taken on a definite meaning of unfit, unclean, and improper and clearly inflicts a burdensome stigma upon the goods of the complainants.

The defendant Carl Sherman, as Attorney General of the State of New York, and the defendant Joab H. Banton, as District Attorney of the County of New York, have threatened to prosecute all complaints of persons engaged as manufacturers, dealers, delicatessen owners, butchers, or otherwise engaged in the sale of raw prepared meat commodities, who are charged with violating the provisions of the statutes hereinbefore referred to.

By reason of the aforesaid threats of prosecution on the part of the defendants, and by reason of the fear inspired by the enactments and by the requirements of the above laws, the complainants and their customers when called upon at their peril to determine whether any meat or meat products are kosher or not kosher and to label the same in accordance with the requirements of the statute herein set forth, have decided and will continue to decide that the products sold by the complainants are not kosher, to the great detriment and injury of the complainants' good will and established trade.

The determination and decision on the part of the complainants have been and will be entirely induced by the fear that some Judge or jury might determine that the Jewish Law or the customs, traditions, and precedents of the orthodox Hebrew religious requirements necessitate that such meats as the complainants sold as kosher are not kosher. Any meat or meat products which are sold from the complainants' premises with the label kosher

thereon are, according to the best information and belief of the complainants, prepared in strict accordance with what the complainants honestly believe to be the orthodox Hebrew religious requirements, in so far as it is humanly possible for the complainants to determine what such requirements are. *The complainants, however, sell only such meats as are clean, wholesome, proper food commodities, carefully inspected, and eminently fit and desirable for human consumption.*

That by reason of the foregoing, the complainants will be irreparably damaged by serious losses, destruction, and interference with their trade, good will, and business reputation, all of which far exceed the sum of $3,000, in the case of each of the complainants. The good will of each complainant will in course of time be destroyed. Their investment of many thousands of dollars in plant and equipment and other property will be substantially diminished in value, if not rendered wholly valueless.

In the *Lewis & Fox* case, the complainant sets forth, in addition, that a vast proportion of the meats and meat products coming into the State of New York comes from States other than the State of New York The complainant sells and ships into the State of New York from the State of Massachusetts more than $60,000 worth of meats and provisions every year. The goods sold by the complainant are delivered from the City of Boston, in the State of Massachusetts to points within the State of New York, to purchasers and consumers within the State of New York, in their original unbroken packages.

Unless restrained and enjoined by the process of the Court, the defendants in enforcing the provisions of the foregoing enact-

ment will continue to threaten prosecution of all those who do not comply with the foregoing provisions, and will intimidate and annoy all the complainant's numerous customers selling meat and meat products within the State of New York. Their course will be followed by other prosecuting attorneys within the State of New York, the inevitable effect of which will be to interfere and obstruct the complainant in the conduct of business in the State of New York causing it great financial loss, interfering with its property rights in the said meats and meat preparations, and its right to sell the same freely within the State of New York. It will thereby inflict great and irreparable injury upon the complainant which it will be impossible to compensate in damages or accurately to ascertain, and for which there is no adequate legal remedy. Many of the persons engaged in the sale of the complainant's meats and meat products have already discontinued their purchases and sales of the said meat and meat preparations because of the fear of criminal prosecution induced by the threats of the said defendants as aforesaid.

That large numbers of those who were now handling such meat and meat preparations, and are at the present time buying and selling the same within the State of New York, will be hereafter induced by said threats to discontinue the sale thereof unless the defendants are restrained from threatening prosecution of them.

In the *Guckenheimer & Hess* case, similar allegations are set forth on the part of three New York manufacturers, who are selling at least $2,500,000 worth of meat and meat preparations to places outside of the State of New York. Unjust burdens imposed by the statutes are an undue, unreasonable, and substantial interference with the interstate commerce of the complainants in the sale, shipment,

and delivery of these commodities from their places of business within the State of New York to points outside of the State of New York.

Preliminary injunctions were therefore sought to enjoin the defendants from enforcing the provisions of the law.

Since the defendants filed motions to dismiss the bills of complaint and did not interpose denials to the complainants' allegations, the facts as alleged by the bills of complaint must be assumed to be true. Thus the allegations that the phrase "orthodox Hebrew religious requirements" and the term "kosher" are vague, indefinite, uncertain, and in capable of correct and common definition are admitted by the pleadings and are deemed to be true and beyond controversy.

BASIS OF EQUITABLE JURISDICTION IN THESE CASES.

The right to injunctive relief in equity is based upon the familiar principles of *ex parte Young*, 209 U. S., 123, 147, 163. Where the enforcement of a void and unconstitutional criminal statute involves as well an unlawful interference with, or encroachment upon, the property rights of the complainant, an injunction will issue to restrain its enforcement.

This principle has since been applied in numerous suits in equity brought in accordance with the same procedure. In those Lever Act cases which dealt with equitable relief, *Tedrow vs. Lewis*, 255 U. S., 98; *Kennington vs. Palmer*, 255 U. S., 100, 101, and several other equitable suits arising under the Lever Act, reported in the next few pages of the same volume, this Court directly decided that even under a statute where wilfulness and a specific criminal intent are essential elements of the crime (compare discussion of the statute, and allegation of wilful-

ness in the indictment, contained in the main Lever Act case, *U. S. vs. Cohen Grocery Co.*, 255 U. S., 81 at page 86), deprivation of property falling within the rule of *ex parte Young* (*Supra*) will entitle the complainant to restrain the enforcement of a criminal statute.

In each of the following authoritative cases, this Court has held that similar suits were properly brought in equity:

Wilson vs. New, 243 U. S., 332;
Adams vs. Tanner, 244 U. S., 590;
Hamilton vs. Kentucky Distilleries, 251 U. S., 146;
Ruppert vs. Caffey, 251 U. S., 264;
Fort Smith & Western Railroad vs. Mills, 253 U. S., 206.

The same procedure was likewise followed in *Hammer vs. Dagenhart*, 247 U. S., 251. In each of the above cases, the Court held that an alleged interference with the established business of the complaint, and the loss of trade and good will, if well founded, damaged the complainant to the extent of at least $3,000.

Constant infractions of the law by the complainants would lead to such an accumulation of fines and successive terms of imprisonment as to result in the practical prohibition against seeking the judicial construction of the law. On the other hand, if the complainants should obey the law and wait until the highest court would determine the question of validity of these laws, and it should then be determined that the laws were invalid, the property of the complainants would have been taken without due process of law.

In addition to the allegations of the complainants that their property in the nature of good will

and established trade is being interfered with to the extent of $3,000, there is in the *Lewis & Fox* case, and in the *Hygrade Provision, et al* case, the additional element that interference with the customers of the complainants is a substantial interference with property rights.

In the case of *Savage vs. Jones*, 225 U. S., 501, the same procedure was approved by this Court. A state statute compelled the labelling of packages with a statement of certain ingredients, and the punishment of customers of the complainant who dealt in the commodity which had not been labelled in accordance with the statute. Since these commodities were resold in their original packages, the Court held that an interference by the prosecuting officers of the State with the purchasers of goods manufactured in, and shipped from other States, inflicted injury to the property rights of the manufacturer by reducing his sales. The Court held that the case was properly brought. The Court said, at page 520:

> "An attack upon this right of the importing purchasers to sell in the original packages bought from the complainant, not only would be to their prejudice, but inevitably would inflict injury upon the complainant by reducing his interstate sales, a result to be avoided only through his compliance with the act by filing the statement and affixing to his goods the labels it required. According to the bill, the State Chemist had threatened the complainant that in default of such compliance he would cause the arrest and prosecution of every person dealing in the article within the State, and had distributed broadcast throughout the State warning circulars. If the statute of Indiana, as applied to sales by importing purchasers in

the original packages, constitutes an unwarrantable interference with interstate commerce in the complainant's product, he had standing to complain, and was entitled to relief, against enforcement by the defendant of the illegal demands. *Scott vs. Donald*, 165 U. S., 107, 112; *ex parte Young*, 209 U. S., 123, 159, 160; *Ludwig vs. Western Union Telegraph Co.*, 216 U. S., 146; *Hopkins vs. Clemson College*, 221 U. S., 636, 643, 645; *Philadelphia Co. vs. Stimson*, 223 U. S., 605, 620, 621."

INTERPRETATION AND CONSTRUCTION OF THE STATUTES INVOLVED.

The statutes under consideration are set forth on pages 2, 3, and 4 of this brief. Chapter 580 adds a new section to the Penal Law, Section 435a. Chapter 581 amends and takes the place of subdivision 4 of Section 435 of the Penal Law.

It will therefore be seen that before Chapters 580 and 581 were passed, the only provisions in the Penal Law with reference to selling nonkosher meat as kosher meat were contained in the language constituting the original subdivision 4 of Section 435 as above set forth.

The new language of Section 435 subdivision 4 and all of Section 435a were added by Chapters 580 and 581 because of the following situation. Under the original Section 435, a prosecution was started in New York against a butcher who had on his window the sign "kosher meat and poultry market" but who as a matter of fact, sold nonkosher meat as well as kosher meat. The Court held in this case (*People vs. Goldberger*, 168 N. Y. Supp., 578), that under such a state of facts Section 435 had not been violated for the reason that the sign on the window was not a declaration that

all of the meat sold or offered for sale was kosher meat, and that so long as any part of the meat offered for sale was kosher meat, the sign was not a misrepresentation. Chapters 580 and 581 were introduced for the purpose of overcoming the effect of this decision. An examination of all of the new part added to Section 435 will show that it has to do merely with the person who sells *both* kosher and nonkosher meat and it provides that such a person shall indicate on his window in four inch letters the words "kosher and nonkosher meat sold here" and should likewise label the kosher and nonkosher meat contained within the store.

The question then arises as to the purposes for which Chapter 580 was passed. An examination of Section 435a, added by Chapter 580, as compared with the new subdivision 4 of Section 435, as created by Chapter 581, reveals the following resemblances and differences. Subdivision 4 of Section 435 is included within the operation of those words which appear at the head of the section, to wit, "a person, who, with intent to defraud." In other words, subdivision 4 is separated from subdivision 1, 2 and 3 of Section 435 by the disjunctive "or" so that it itself is deemed to be included within the words "a person, who, with intent to defraud." Section 435a, however, cannot be construed in the same way. The words "a person, who, with intent to defraud" which begin the new section do not in form or appearance seem to apply to the section as a whole as in Section 435. On the contrary, the section is built up of co-ordinate clauses separated by semi-colons. Each clause is distinct by itself and outlines a separate and different offense. The only clause thus coordinated which contains the words "a person, who, with intent to defraud" is the first clause; the other clauses have no such provision.

A second difference is that Section 435a as added by Chapter 580 is to "take effect September 1st, 1922" whereas subdivision 4 of Section 435 as amended by Chapter 581 is to "take effect immediately."

As to the resemblances between the new Section 435a and the new subdivision 4 of Section 435, the language of both sections is identical except for the following immaterial differences. Section 435a in describing the words "any meat or meat preparation" has added the following in lines 3 and 11 respectively "whether such meat or meat preparation be raw or prepared for human consumption," and "either raw or prepared for human consumption." In line 15 of Section 435a as set forth on page 3 of this brief, the word "preparations" appears as "products" in Section 435, and in line 16 of the said Section 435a instead of the words "each kind of" Section 435 has the word "such." It will therefore be seen that so far as the material provisions of the language are concerned the sections are absolutely identical, except for the words, "a person, who, with intent to defraud."

Both of these laws were approved by the Governor of the State of New York on the same day, April 11th, 1922. Chapter 581 was introduced in the Assembly of the New York State Legislature on January 18th, 1922, and on the same day was introduced in the Senate. (New York State Legislative Index 1922). Chapter 580 was introduced in the Assembly on February 9th, 1922, and in the Senate on February 13th, 1922 (Id.) Chapter 581 passed in the Assembly on February 13th, 1922, and in the Senate on March 6th, 1922, Chapter 580 passed the Assembly on February 27th, 1922, and passed the Senate on March 6th, 1922. Thus the bills although introduced on separate dates passed the second house of the Legislature on the same

day, went to the Governor on the same day and were approved on the same day.

The question therefore arises as to what the difference between the two sections is. Why should both have been enacted? An examination of the structure of the sections will show the difference between them. In Section 435a the words "who, with intent to defraud" appear only in the first co-ordinate clause and are not repeated in any of the other clauses set off by semi-colons. Nor is it incorporated by reference in any portion of Section 435a subsequent to the first clause set off by the first semicolon. On the other hand, Section 435 makes the words "a person, who, with intent to defraud" apply to the entire section and to all its parts. Therefore, it is apparent that Section 435 requires as an element of the crime therein set forth the intention to defraud, whereas Section 435a does not include the intention to defraud in each of its subdivisions.

The Legislature intended, so far as the language appears, to create two misdemeanors. The first would involve as a necessary element the intention to defraud. This being merely an amendment of a prior statute, which in itself involves an intention to defraud, the Legislature made the Act take effect immediately. Section 435a, however, went very much further and provided that the mere selling with the improper labelling would in itself constitute a misdemeanor irrespective of the intention of the seller. This being a more far reaching enactment, the act was not made to take effect immediately but was not to take effect until September 1st, 1922. This was in accord with the general rule of legislation that when drastic and far-reaching legislation is passed without any emergency, the Legislature postpones the time of its taking effect so that the general public and business interests may have time to become acquainted with its provisions.

Furthermore, the punctuation of Section 435a must lead inevitably to the conclusion that only the first co-ordinate clause set off by a semi-colon involves the necessity of an intention to defraud whereas the other co-ordinate clauses set off by semi-colons do not make it necessary that the intention to defraud be present. In construing the language of a statute the Court will be aided by the punctuation in the said statute, and the Court of Appeals of New York has distinctly so held.

In the case of *Tyrrell vs. The Mayor*, 159 N. Y. 239, the statute to be construed by the court was a part of a charter of the City of New York and read as follows:

> "The annual salaries and compensations of the members of the uniformed force of the department of street cleaning shall be fixed by the board of estimate and apportionment and shall not exceed the following: Of the general superintendent, three thousand dollars; of the assistant superintendent, two thousand five hundred dollars; of the superintendent of stables, two thousand dollars; of the master mechanic, one thousand eight hundred dollars; of the superintendent of final disposition, two thousand dollars; of the assistant superintendent of final disposition, one thousand five hundred dollars; of the district superintendents, one thousand eight hundred dollars each; of the time collectors, one thousand two hundred dollars each; of the section foremen, one thousand dollars each; of the dump inspectors, one thousand dollars each; of the assistant dump inspectors, nine hundred dollars each; of the tug and scow inspectors, one thousand dollars each; of the dump boardmen, seven hundred

and twenty dollars each; of the sweepers, seven hundred and twenty dollars each; of the drivers seven hundred and twenty dollars each; of the stable foremen, one thousand two hundred dollars each; of the assistant stable foremen, nine hundred dollars each; *of the hostlers, seven hundred and twenty dollars each, and extra pay for work on Sundays.*"

The plaintiff in that case was a section foreman in the street cleaning department, who had worked several Sundays and who was seeking to recover of the City extra pay for such work according to the provisions of the charter above quoted. The court held, however, that by an examination of the punctuation, it was evident that the legislature intended the extra pay for work on Sundays to apply only to hostlers, because each occupation was set off by a semi-colon into a distinct clause and the provision for extra pay was included in only one of the clauses set off by the semi-colon. The court, in its opinion, emphasizes the fact that punctuation in the acts of the New York Legislature is an important part of the statute and is of material aid in defining the intention of the Legislature, in the following language (at page 242):

"The punctuation of this statute is of material aid in learning the intention of the legislature. While an act of parliament is enacted as read and the original rolls contain no marks of punctuation, a statute of this state is enacted as read and printed, so that the punctuation is a part of the act as passed and appears in the roll when filed with the secretary of state. The Constitution provides that, except in a case of necessity, formally certified by the governor, every bill must be printed 'in its final

form' and placed upon the desks of members of the legislature at least three days prior to its passage, and upon the final reading no amendment is allowed. (Const. art. 3, Section 15.)

The punctuation, however, is subordinate to the text and is never allowed to control its plain meaning, but when the meaning is not plain, resort may be had to those marks, which for centuries have been in common use to divide writings into sentences, and sentences into paragraphs and clauses, in order to make the author's meaning clear. The sentence under consideration contains more than two hundred words, divided into nineteen clauses. The first clause, separated from the rest by a colon, is general, and applies the command of the legislature to all that follow. The rest of the sentence consists of eighteen clauses, each separated from and made independent of the others by an intervening semicolon. While each must be read in connection with said general command, neither need be read in connection with any other part of the sentence. Each clause contains a comma, separating the position named from the salary belonging to it, and is complete in itself, except that it depends for a part of its meaning upon the primary command with which the sentence opens. The words relating to extra pay are not separated from the remaining words of the clause by a semicolon, as would be expected if they applied to the preceding clauses, but by a comma, which indicates an intention to limit their application to the clause in which they appear. This clear system of punctuation forbids, as we think, that the last words of the last clause, viz., 'and extra pay for work on Sundays,' should be read as a part of each of the other clauses

> except the first, which is obviously general in its application. The effect of the punctuation is the same as if the sentence was divided into eighteen independent sentences, with the first clause a part of each."

Following the language of Chapter 580 it would certainly appear on the authority of the above cases that Section 435a is to be construed as a combination of four co-ordinate sentences, each set off by semi-colons, with the provision "a person, who, with intent to defraud" applying only to the first clause.

U. S. vs. Goldenberg, 168 U. S., 95, also involved the construction of co-ordinate and independent clauses as they appeared in the following statute, approved June 10th, 1890, Chapter 407, 26 Stat., 131, 137:

> "That the decision of the collector as to the rate and amount of duties chargeable upon imported merchandise * * * shall be final and conclusive against all persons interested therein, unless the owner * * * shall, within ten days after 'but not before' such ascertainment and liquidation of duties, as well as in cases of merchandise entered in bond as for consumption, or within ten days after the payment of such fees, charges, and exactions, if dissatisfied with such decision give notice in writing to the collector, setting forth therein distinctly and specifically, and in respect to each entry or payment, the reasons for his objections thereto, and if the merchandise is entered for consumption shall pay the full amount of the duties and charges ascertained to be due thereon."

The Circuit Court of Appeals certified to the Supreme Court of the United States the question

as to whether it was necessary for the owner to pay the duties as well as give notice of protest within ten days after the liquidation of such duties in order to have the matter reviewed. The Court held on page 102 that the statute contained

> "two separate clauses, each prescribing a condition. One is, 'shall within ten days after "but not before" * * * give notice' etc. and the other, 'shall pay the full amount of the duties,' etc. In the latter no time is mentioned, and, the clauses being independent, there is no grammatical warrant for taking the specification of time from the one and incorporating it in the other."

It would therefore be improper for the Court in the present case to take the provision "a person, who, with intent to defraud," which exist in the first independent clause of Section 435a and incorporate it in the three other independent clauses.

See also in the matter of the Application of *Roberts*, 157 Cal., 472 at page 474, where the Court in interpreting a statute similarly composed of several disjunctive and separate clauses said:

> "Although comprising but a single sentence, Section 337-a of the Penal Code creates many distinct offenses. It begins by the phrase 'every person', and each subsequent clause is connected therewith by appropriate punctuation. It is written in the disjunctive throughout, and the several offenses therein described are apparently as distinct and independent of each other as if they had been enacted in separate sections. In general, when such form of expression is used, the effect of the language pertaining exclusively to each offense described is not affected or modified by the words used

> solely in describing the other offenses, but the description of each is to be construed as if it stood alone and were read in connection with the general words applying to all."

Both Chapters 580 and 581 were passed and approved on the same day. They apply to the same general subject matter and to the same kind of crime. It is difficult to see why both of these statutes should have been passed each taking effect at a different time unless there was this difference between them, namely, that the one, Chapter 581 prescribed a fraudulent intent as a fundamental of the misdemeanor whereas Chapter 580 made the acts a misdemeanor irrespective of the intent. That is the only difference of any fundamental importance between the two chapters. It must be presumed that the legislature of the State of New York was not so devoid of intelligence as to pass two statutes each providing the same thing, to take effect on different days, unless there was this essential difference between the two enactments. It is a fundamental rule in statutory construction as laid down by Mr. Justice Field early in the history of this court in the case of *U. S. vs. Tynen*, 11 Wall. 88, at page 92, that

> "When there are two acts upon the same subject the rule is to give effect to both if possible."

Unless we follow the obvious grammatical construction of the two sections so as to lead to the inevitable conclusion that the one necessitates an intent whereas the other does not, we must necessarily say that the Legislature of New York passed two statutes almost identical in language for the same offense on the same subject so that one of them may be completely disregarded and without

mutilating the legislative intent. The court must, however, if possible construe the chapters so that both are given some effect.

In view of the fact that these statutes were approved on the same day and apply to the same subject-matter they are *in pari materia* and must be construed together in order to read the legislative intent. As was said by this court in the case of *Kohlsaat vs. Murphy*, 96 U. S., 153, 159:

> "In the exposition of statutes, the established rule is that the intention of the law-maker is to be deduced from a view of the whole statute, and every material part of the same; and where there are several statutes relating to the same subject, they are all to be taken together, and one part compared with another in the construction of any one of the material provisions, because, in the absence of contradictory or inconsistent provisions, they are supposed to have the same object and as pertaining to the same system. Resort may be had to every part of a statute, or, where there is more than one in pari materia, to the whole system, for the purpose of collecting the legislative intention, which is the important inquiry in all cases where provisions are ambiguous or inconsistent.
>
> Rules and maxims of interpretation are ordained as aids in discovering the true intent and meaning of any particular enactment; but the controlling rule of decision in applying the statute in any particular case is, that, whenever the intention of the legislature can be discovered from the words employed, in view of the subject-matter and the surrounding circumstances, it ought to prevail, unless it lead to absurd and irrational conclusions, which

> should never be imputed to the legislature, except when the language employed will admit of no other signification."

When we look at both of the statutes now before the Court, we must come to the conclusion that the legislature could not have intended otherwise than to make a fraudulent intention unnecessary under Chapter 580, for otherwise we would have two distinct enactments creating and punishing but one offense.

Such a situation was declared to be an anomaly and one to be avoided in the construction of a statute if at all possible.

U. S. vs. Sterer, 222 U. S., 167, was a case involving a writ of error to review a judgment quashing an indictment as not stating an offense triable in the western district of Kentucky. The statute under which the indictment was drawn was Section 3894, Revised Statutes as amended which provided that

> "no letter, postal-card, or circular concerning any lottery * * * or other similar enterprise offering prizes dependent upon lot or chance, or concerning schemes devised for the purpose of obtaining money or property under false pretenses, * * * and no lottery ticket or part thereof, * * * shall be carried in the mail or delivered at or through any post-office or branch thereof * * *."

The section further provided that any person violating this provision is guilty of a misdemeanor and can be indicted in the district either where the letter was mailed or where it was delivered. The indictment charged that the defendant devised a cer-

tain scheme for the purpose of obtaining money "by and under false pretenses" and pursuant thereto, the defendant through letters mailed in Iowa to certain persons in Kentucky made false and fraudulent representations as to certain cattle to be sold and that the said letters were delivered in Kentucky to the persons to whom they were addressed. The defendant claimed that proceedings should have been brought under Section 5480 which provides that

> "if any person having devised or intending to devise any scheme or artifice to defraud, * * * to be effected by either opening or intending to open correspondence or communication with any person * * * by means of the Post-Office Establishment of the United States, shall, upon conviction be punishable etc."

It will be noted that there is no provision in this Section 5480 allowing the indictment to be laid in the district where the letter was received. The government claimed, however, that the indictment was properly brought under Section 3894 because that section includes "schemes devised for the purpose of obtaining money or property under false pretenses." The defendant claimed that it should have been brought under Section 5480 as a "scheme or artifice to defraud." The Court held that the two sections must be read together and that they were intended to prevent the use of the mail for certain purposes; that the one applies to the use of the mail for the purpose of promoting lotteries or other like schemes of chance, and that the other was intended to prohibit the use of the mail to carry on schemes of general fraud, the language being "any scheme or artifice to defraud." The Court so construed the statutes that the one section would not include a

crime under the other section on the theory that otherwise there would be two sections to punish one offense. The Court said at page 173:

> "If, then, this indictment is also maintainable under Section 3894, it must be because we are forced to conclude that Congress, when it revised the statutes, intended to make the use of the mails to effect a scheme to defraud indictable and punishable under either of two distinct provisions, *and that the district attorney might elect as to which he would proceed under. Such a supposition is not to be lightly adopted. To so conclude would result in the anomaly of an offense created and punished by two distinct enactments.* Under the one the accused may be proceeded against in a district where he could not be prosecuted under the other. The procedure under one differs in some important particulars from that admissible under the other, and the accused is subject to a measure of punishment under one not possible under the other. Thus, under Section 3894 an indictment will lie in the district in which the defendant caused the letter to be delivered by the mail to the person addressed. That is not the case under Section 5480. Under Section 3894, one may be imprisoned not longer than one year, while under the other he may be imprisoned for eighteen months. Undr Section 3894, he is subject to indictment for any number of violations. Under the other the indictment may only charge offenses to the number of three committed within the same six calendar months" (Italics ours).

The indictment was quashed.

This case is a perfect analogy to the situation now presented to this court. Unless these two statutes be construed together so as to disclose the legislative intent to describe a fraudulent intention for the one and not for the other, we shall be in a position of saying that the legislature enacted two statutes on the same day and that the Governor of New York State approved two statutes on the same day creating the same offense punishable the same way, leaving it to the District Attorney to elect as to which he would proceed under. Even if the grammatical construction of the sections did not so clearly warrant the interpretation urged by this brief, this court should be slow to construe the statutes in such a way as to lead to such an assumption.

The case of *MacDaniel vs. U. S.*, 87 Fed., 324, in which a writ of certiorari was refused by this court, in 171 U. S., 689, followed the same rule of construing two statutes in *pari materia* together so as to discern the legislative intent. In this case the indictment charged the defendant with conducting a lottery business through the United States mail under an assumed name. There was a demurrer to the indictment. The indictment was brought under the statute approved March 2nd, 1889, providing, first, that the use of the mails for sending counterfeit money or other certain devices therein mentioned is criminal, and, secondly, that anyone using the mails for any "scheme or device mentioned in the preceding section or any other unlawful business whatsoever," *under an assumed name*, shall be punishable etc. Another statute, Revised Statutes, Section 3894 as amended by Act of September 19th, 1890, provided that no letter concerning a lottery scheme was to be transmitted through the United States mail. It is to be noted that the second statute (Revised Statutes, Section 3894 as amended by Act September 19th, 1890) said nothing about the

business being conducted under an assumed name. Nevertheless, the indictment was one for conducting a lottery business through the United States mail *under an assumed name.*

The court held, however, that both statutes referred to the same subject-matter, to wit, the use of the United States mails, and that as such they were to be construed together as *in pari materia.* As so construed, the Court held that the words in the first statute, "or any other unlawful business whatsoever" would be held to include the unlawful business set forth in the second statute, to wit, the lottery business.

This rule of construing statutes *in pari materia* together so as to arrive at the legislative intent has been followed time and again by this court.

> *Chott vs. Ewing*, 237 U. S., 197;
> *Richardson vs. Harmon*, 222 U. S., 96;
> *White vs. United States*, 191 U. S., 545, 551;
> *McChord vs. Louisville & Nashville R. R. Co.*, 183 U. S., 483, 497;
> *District of Columbia vs. Hutton*, 143 U. S., 18, 26;
> *Nobles vs. Georgia*, 168 U. S., 398.

The highest court in the State of New York has also approved and followed the rule of construing statutes *in pari materia* together. The Court of Appeals in *Smith vs. People*, 47 N. Y., 330, said at page 339:

> "Statutes enacted at the same session of the Legislature should receive a construction, is possible, which will give effect to each. They are within the reason of the rule governing the construction of statutes in pari materia.

Each is supposed to speak the mind of the same legislature, and the words used in each should be qualified and restricted, if necessary, in their construction and effect, so as to give validity and effect to every other act passed at the same session."

People vs. Fitzgerald, 180 N. Y., 269, 275;
People ex rel Onondaga County Savings Bank vs. Butler, 147 N. Y., 164, 168;
Mayor vs. Eighth Avenue R. R. Co., 118 N. Y., 389, 396.

Following the grammatical construction of the sentences in each section and construing them together so as to give each an effect, if possible, the conclusion seems inevitable that Chapter 580 is different from Chapter 581 in that it does not prescribe for each of its provisions a fraudulent intent.

In the court below the appellee cited the cases of *Baender vs. Barnett*, 255 U. S., 224; *Verona Central Cheese Co. vs. Murtaugh*, 50 N. Y., 314; *Omaechevarria vs. Idaho*, 246 U. S., 343, in support of the proposition that no prosecutions will be had under a law such as Chapter 580, unless there is a wilful intent to defraud present as a necessary element. It is to be observed at the outset that none of these cases dealt with the construction of statutes in pari materia. Each of these cases therefore is clearly distinguishable. There are, however, other distinguishing features present in each case.

Baender vs. Barnett cited *Supra*, involved the construction of a section of the Criminal Code of the United States which declared "that whoever, without lawful authority, shall have in his possession" any die similar to the die designated for currency should be subject to the penalties therein described. The original statute prior to the amend-

ment required an intent to fraudulently or unlawfully use the same. The court merely construed "possession" under the amended section as meaning a conscious and willing possession and that mere physical control or unconscious custody was not sufficient to make out the crime. There was therefore, no implication of any unlawful intent but merely a reasonable construction of the word "possession" employed in the statute.

In *Verona Central Cheese Co. vs. Murtaugh*, cited *Supra*, an action was commenced for a penalty authorized under a statute for delivering skimmed and adulterated milk at the plaintiff's factory. The opinion clearly states that the act which gave the penalty sued for, only subjected the person who "knowingly" sold or supplied to any cheese factory the adulterated or skimmed milk. The intent of the act was to punish the individual for the actual and intentional violation of its provisions. The testimony tended to show that the defendant was in the management and control of the farm and that his wife, son and daughters delivered to the plaintiff's factory skimmed and adulterated milk. The plaintiff was non-suited at the close of his case. The Court held, however, that under the circumstances of the case, the acts of the wife and daughters might have been authorized by the defendant, and that the case should have been presented to the jury, as the act under consideration in the case contained an express requirement that the defendant do the acts prohibited therein "knowingly" and the only question necessary to the decision of the Court involved the right of the plaintiff to have his case submitted to the jury. Under the circumstances, any statement of the court to the effect that knowledge or intent would be applied would be mere dictum.

In *Omacchevarria vs. Idaho*, cited *Supra*, the Court distinctly refers to Section 6314 of the Re-

vised Codes of Idaho which provided in substance that in every crime or public offense there must exist a union of act and intent. This supplied the intent by means of incorporation by reference of another statute which made intent or knowledge a necessary element of the crime under the statute which was considered by the court. See discussion of the court on page 348 of *Omaecherarria* case.

POINT ONE.

IT IS WELL ESTABLISHED THAT CRIMINAL ENACTMENTS CONTAINING INDEFINITE, UNCERTAIN, AND UNASCERTAINABLE STANDARDS OF GUILT ARE UNCONSTITUTIONAL.

This Court has recently re-affirmed in the Lever Act cases (*U. S. vs. Cohen Grocery Co.*, 255 U. S., 81 *et. seq.*) the rule that in criminal legislation there are the constitutional requisites of certainty, adequate definition, reasonable precision, and of certain information, to the accused, concerning the nature of the statute he is alleged to be violating. These principles have been explicitly announced in the leading adjudications. In *U. S. vs. Cohen Grocery Co.*, 255 U. S., 81, at page 89 the Court says:

> "The sole remaining inquiry, therefore, is the certainty or uncertainty of the text in question, that is, whether, the words 'That it is hereby made unlawful for any person wilfully * * * to make any unjust or unreasonable rate or charge, in handling or dealing with any necessaries,' constituted a fixing by Congress of an ascertainable standard of guilt and are adequate to inform persons accused of violation thereof of the nature and cause of the accusation against them. That they are not, we are of opinion, so clearly results from their mere statement as to render elaboration on the sub-

> ject wholly unnecessary. Observe that the section forbids no specific or definite act. It confines the subject-matter of the investigation which it authorizes to no element essentially inhering in the transaction as to which it provides. It leaves open, therefore, the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against."

In the case of *U. S. vs. Reese*, 92 U. S., 214, at page 220 the Court says:

> "Penal statutes ought not to be expressed in language so uncertain. If the legislature undertakes to define by statute a new offence and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime."

And again, at page 219,

> "Laws which prohibit the doing of things, and provide a punishment for their violation, should have no double meaning. A citizen should not unnecessarily be placed where, by an honest error in the construction of a penal statute, he may be subjected to a prosecution * * *."

The substitution of indefinite, uncertain, vague, and varying standards as to the interpretation of a criminal law does not give to the accused that definite degree of warning which is required by the constitution.

U. S. vs. Brewer, 139 U. S., 278, at page 288:

> "Laws which create crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid."

In *Tozer vs. U. S.*, 52 Fed., 917, at 919, the Court says:

> "But, in order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty."

Due process of law under the 14th amendment requires that State statutes be certain, definite, and explicit in the definition of crime. This Court has held by its decisions in *International Harvester Co. vs. Kentucky*, 234 U. S., 216 and *Collins vs. Kentucky*, 234 U. S., 634, that the principles which determine the constitutionality of Congressional Legislation under the 5th and 6th Amendments are applicable to enactments of the State Legislatures under the due process clause of the 14th amendment. The rules of constitutional law, therefore, which we have quoted are equally authoritative in the case of State enactments.

POINT TWO.

THE VAGUENESS, UNCERTAINTY, AND INDEFINITENESS OF THE WORD "KOSHER" AND THE PHRASE "ORTHODOX HEBREW RELIGIOUS REQUIREMENTS, ARE DUE TO THE SOURCES, VOLUME, AND CHARACTER OF THE FOREIGN LAW WHICH IS THE BASIS OF THE STATUTE.

The very essence of this legislation is to be found in the term "kosher" and in the phrase "orthodox Hebrew religious requirements." Nowhere in the statutes is either "kosher" or "orthodox Hebrew religious requirements" defined, limited, or explained.

There is no legislative aid in the construction of these words, which incorporate in our criminal law standards never known to the common law, and drafted from *a system of jurisprudence entirely foreign to the sources of our own law*. There is no legislative definition in setting forth substantive activity. These terms are merely generalizations or summaries of the *entire corpus juris* of the Jewish Law. *They include the old testament, the oral law, the written law, commentaries, responses of the Rabbis, codifications of the body of the Jewish law, and numerous individual views of learned men.*

We have seen, supra, that the present causes stand on motions to dismiss the bills of complaint. The defendants did not deny the allegations therein set forth. Thus the allegations that the phrase "orthodox Hebrew religious requirements and the term kosher" are vague, indefinite, and uncertain, and are incapable of correct and common definition are admitted and true beyond controversy.

The elements that contributed to the conception of the phrase "kosher" and the multitudinous sources from which we are to determine what are the "orthodox Hebrew religious requirements" are stated in the testimony of Rev. Dr. Bernard Drachman who was called as a witness on behalf of the prosecution in the case of *People vs. Goldberger*, 168 N. Y. Supp., 578, and whose testimony was likewise used by stipulation in the case of *People vs. Atlas*, 183 A. D., 595, affirmed without opinion in 230 N. Y., 629. This testimony has been included in the moving affidavits in the record of the cases under consideration.

This testimony sets forth clearly how difficult it is to determine authoritatively what the law of kosher is in given stated facts. The Court will bear in mind that the codification of the Jewish law

by Caro, which it is alleged clearly contains the principles of the law of kosher, has never been translated into the English language. *Even assuming that the Code of Caro contained, for all practical purposes, the law of kosher from the beginning of the selection of the animal and continuing to the final disposition of the food product, we would be making a violation of the Code of Caro, published in* 1565, *a voluminous compilation of a foreign system of jurisprudence, written in a foreign language, a crime under the law of the State of New York.*

But even this grave difficulty does not adequately convey the plight of the ordinary inhabitant who wishes to determine, in a given instance, whether either in the choice of the animal, the ritual of slaughter, transportation, the conduct of the seller's business, the preparation of the product, and the other numerous and complex considerations which enter into the conception of kosher, the requisite regulations have been followed. But the Code of Caro is not at all comprehensive. Like any codification, the Code of Caro must be viewed in the light of the history, the precedents, and the learning known to the Jewish law prior to his time. These principles must find their origin in the bible, the oral law, the written law, the commentaries, and the responses which preceded it. There is a great rabbinical literature which contains the decisions and explanations of all the Jewish ecclesiastical authorities.

We refer to the testimony of Dr. Drachman, folios 32 and 33, Record of Hygrade Provision Co. case:

> "(Witness continued): Based upon these directions in the Old Testament, there has developed an oral interpretation and a written

interpretation of what these passages in the Bible mean. In addition to the written law as contained in the Bible, there is an oral law or tradition which is taught by the Jewish authorities to have been handed down from generation to generation.

Q. Are these oral law or traditions to which you refer in the form of commentaries? A. In the talmud, and Mishnah, Sifra and Sifrey. There are questions and answers. The cases were raised constantly from time to time in the course of history and these were submitted to the Rabbis or interpreters of the Jewish law. These are rules that regulate the religious Jewish life. They are called technically the responses of the Rabbis. *There is a great rabbinnical literature, which contains the decisions and explanations of all the Jewish ecclesiastical authorities. A Rabbi in deciding a question will be guided by all of these statements as far back as the Bible.* In the talmud we have 2 great rabbinnical codes known as the Schulcan Aruch and (——), is the great code or *corpus juris*, of the Jewish Theological Law, canon law. In addition to this there are all these Responsa; a great part of the literature in which the questions are treated.

By Mr. Wahle:

"Q. *How large doctor is the bibliography in reference to this question of kosher? A. Several thousand great volumes.*"

The confusion thus resulting confounded the very legislature which enacted these statutes. The chapters under consideration require that where a person sells kosher or nonkosher meat in the same premises, a sign must be displayed to that effect, and

each meat must be labelled kosher or nonkosher as the case may be. In Dr. Drachman's testimony, it is clearly set forth that the sale of kosher and nonkosher meat in the same premises is distinctly disapproved.

"Q. Let us assume that there is a butcher-shop in the City of New York, with the sign kosher in front of the shop, that there is meat in that shop that is not koshered, and that chickens that are slaughtered according to the ritualistic method are brought into the butcher-shop. In your opinion if these chickens were kept in the same shop, in the same place, in the same vessels and utensils and handled in the same way as the meat not kosher would those chickens be kosher?

I object to the same vessels and utensils.

District Attorney: I will withdraw utensils and vessels, and substiute in the same shop and in the same icebox.

A. *This state of affairs would be one that rabbinical authority would distinctly disapprove of. We do not approve of having in the one place things that are permitted and things that are not permitted.* Especially, in-as-much as it was a regular state of affairs. We consider it a very great sin to mislead anyone either directly or indirectly. A condition might be partly correct and partly false and not a direct falsehood, but the impression might be created that is misleading, and a disobedience of our law and sinful as such. If a religious Jew happens to have a forbidden article of food, trafe, which he cannot conscientiously use, he may dispose of it to people who can dispose of it and use it. If he buys a mass of material, he may dispose of the forbidden things,

because they have come casually into his possession. *It is a duty of the Rabbi to adopt such rules and regulations, when individual cases come up, according to the particular state of facts.*

Mr. Wahle: I move to strike from the record Dr. Drachman's testimony in regard to chickens,—interrupted.

By District Attorney:

Q. As I understand your answer to Judge Wahle, you said there were certain requirements of the Hebrew faith, which provided that food products be safe-guarded and secured in a particular way and that if they were not so safeguarded and so protected, that it would be considered constructively trafe, not kosher? A. The religious Jew would not use it.

Q. *You did say that the religion provided that Jewish people should be protected from certain impositions, and that if the meat in that store were sold with the chickens that they would become trafe and not kosher?* A. *Yes, sir.*"

The statute, therefore, by compelling a man to label some meat as nonkosher and the rest of the meat as kosher compels the defendant to do something which some Rabbi and jury may find to be a violation of the Jewish Law. If meat, which is otherwise in accordance with the orthodox Hebrew religious requirements, becomes nonkosher, merely because it is sold in the same premises as the kosher meat, under the principle of Jewish law that kosher and nonkosher meat cannot be sold in the same premises, how can a person lawfully label each kind of meat? This raises a very apparent anomaly. The practical situation is, that if the Jewish law should

be found by a Jury to be as Dr. Drachman stated, that kosher meat being sold in the same premises with nonkosher meat makes the kosher meat nonkosher, the defendant, who, pursuant to the terms of these chapters, labelled certain meat kosher, would under the very authority of those laws be committing a crime against the Jewish law.

POINT THREE.

THE CRIMINALITY OF THE COMPLAINANTS DEPENDS UPON A FINDING OF FACT BY THE JURY OF A BODY OF LAW WHOLLY FOREIGN TO THE COMMON LAW AND OUR SYSTEM OF JURISPRUDENCE.

It is an elementary principle of conflicts of law that courts will not take judicial notice of foreign law or jurisprudence. These must be proved as questions of fact. Our courts will not take judicial notice of foreign laws or principles of a foreign system of jurisprudence whether these be ecclesiastical laws or the laws of a foreign sovereignty.

In *Baxter vs. McDonnell*, 155 N. Y. 83, at page 93, the Court says:

> "The pleader seems to have assumed that the court would take judicial notice of the nature and powers of the Holy Roman Catholic Church, so far as its civil rights and duties are concerned, without any averment or proof upon the subject. Judicial notice is to be taken with caution, and every reasonable doubt as to the propriety of its exercise in a given case should be resolved against it. (*Brown vs. Piper*, 91 U. S. 37; 12 Am. & Eng. Ency. of Law, 151). According to the general

> practice of the courts in all jurisdictions proof has been required upon the subject of church rights and powers, and whatever is to be proved must be alleged."

To the same effect are *Youngs vs. Ransom*, 31 Barb. 49, 60; *Cohen vs. The Congregation Shearith Israel*, etc., 114 A. D. 117, 119.

These cases hold that the ecclesiastical law is no part of the law of this State. Before our courts can take notice of religious precepts, practices or principles, or the law of any foreign country, their existence must be alleged and proved as issues of fact. This is the rule even as regards civil cases. The scope and effect of foreign law is proved as any other question of fact. In a criminal prosecution based upon what the jury or the judge or the appellate court might find to be the facts, the constitutional invalidity of incorporating principles of a foreign law into our penal codes is more clearly portrayed. While in civil cases, the courts will presume that the common law of a sister State is the same as the common law of the forum, *International Text Book Co. vs. Connelly*, 206 N. Y. 188, the presumption is indulged in only as to States whose legal system is based upon common law principles. In *Cuba R. R. Co., vs. Crosby*, 222 U. S. 473, Holmes, J., says at page 479:

> "In the case at bar the court was dealing with the law of Cuba, a country inheriting the law of Spain and, we may presume, continuing it with such modifications as later years may have brought. There is no general presumption that that law is the same as the common law. We properly may say that we all know the fact to be otherwise. *Goodyear Tire & Rubber Co. vs. Rubber Tire Co.*, 164

> Fed., 869. Whatever presumption there is is purely one of fact, that may be corrected by proof. Therefore the presumption should be limited to cases in which it reasonably may be believed to express the fact. Generally speaking, as between two common law countries, the common law of one reasonably may be presumed to be what it is decided to be in the other, in a case tried in the latter state. But a statute of one would not be presumed to correspond to a statute in the other, and when we leave common law territory for that where a different sytem prevails obviously the limits must be narrower still. *Savage vs. O'Neil*, 44 N. Y. 298. *Crashley vs. Press Publishing Co.*, 179 N. Y. 27, 32, 33. *Aslanian vs. Dostumian*, 174 Mass., 328, 31."

These principles definitely establish that even in civil cases the courts will not take judicial notice of foreign law and foreign statutes. There is not even a presumption that the law, even in civil cases, is the same in a foreign country as it is in the law of the forum, where the law of the foreign country is based upon a system other than the common law of England. If, therefore, the doctrine of judicial notice does not apply, foreign statutes and nonstatutory law must be proved as issuable facts. In practical effect it would mean that the question of foreign law would have to be found as a fact by the jury. Just what these statutes forbid would then of necessity become a question of fact, upon which reasonable men might very well differ.

As a practical matter, let us observe how a trial under these sections will be conducted. To prove the meaning of "kosher" and the contents of the phrase "orthodox Hebrew religious requirements."

an expert will be called to testify as to the meaning of those terms. The defendant will in his case call an expert to testify as to the meaning of the same terms. Proof will be taken on each side, and an issuable fact will be raised as to whether the State or the defense is correct in its interpretation and explanation of the word "kosher" and the phrase "orthodox Hebrew religious requirements." The Judge, not being able to take judicial knowledge of the foreign law, customs, and precedents, will then instruct the jury to find whether the State or the defense is correct in its interpretation of the Jewish law. Following that determination, the jury will then be asked to pass upon whether the defendant was guilty of such acts as would violate the foreign law so found. Practically, therefore, the determination of the defendant's guilt will be based upon the finding of fact by a jury in a controversial field. *The prohibitions of the statutes would not be fixed by an immovable standard reasonably ascertainable, but by a chance finding of a jury on facts, which inhabitants of our country have no way of determining. The jury writes the law.*

We respectfully submit that this is the condition which has led to the nullification of the numerous statutes, which we have detailed above, on the ground of vagueness, indefiniteness, and uncertainity, because they left the power of determining the prohibitions of the statutes to the varying opinions of juries and judges as to the meaning of the law, under which the individual was being prosecuted.

POINT FOUR.

NO CASE AUTHORIZES A STANDARD OF CRIMINALITY BASED UPON A BODY OF LAW WHOLLY FOREIGN TO THE COMMON LAW AND OUR SYSTEM OF JURISPRUDENCE.

The appellees cannot point to a single case which incorporates, as a part of our criminal law, a term or concept of a system of law, wholly foreign to the common law and to our entire system of jurisprudence. They cannot refer us to any authorities which hold that we may make criminal any activity prohibited by a code of law whose origin, history, and development is totally at variance with the common law.

There are some adjudicated cases which hold that a statute may punish an offense by a term known by the common law. This definition will be sought in common law authorities and that meaning will be implied in the application of the statute.

Thus in *United States vs. Palmer*, 3 Wheaton 610, an illustrative case, a statute which referred to the term "robbery" was held to be sufficiently definite to sustain a conviction on the ground that robbery was defined with reasonable precision at the common law.

Similarly, the incorporation in a criminal statute of the term "restraint of trade" was held to be valid because of its reasonably definite and ascertainable common law meaning in view of the common law precedents and legal principles already adjudicated. *Nash vs. United States*, 229 U. S., 373.

An attempt, however, to refer to a foreign system of jurisprudence, or to define crime in terms of a system of law which does not find its origin

in the common law is, clearly distinguishable. A reference to "orthodox Hebrew religious requirements" is no more certain than a reference to the penal laws of any other foreign country, whose system of jurisprudence is utterly at variance with principles of law familiar to common law students. The cases in which an attempt is made to incorporate principles of foreign and strange systems of law are exceedingly rare. There are several cases, however, which are of extreme importance in determining the power of the legislative branch of the Government in incorporating into our system of criminal law the unfamiliar and foreign conceptions of a system of law unknown to students of our jurisprudence.

In *In re Lockett*, 179 Cal. 581, a section of the Penal Code which declared acts known as "fellatio" and "cunnilingus" to be felonies, was unconstitutional as being void for uncertainty. After reviewing numerous foreign authorities, in an attempt to learn the meaning of these terms, and indicating how varying and indefinite the contents of these words were, the Court in its opinion at page 590, says:

> "With the books in confusion so hopeless we cannot say that the word has a definite technical meaning. It seems to me that without arrogating to ourselves the function of legislation we cannot definitely declare what the statute means, and that even if we could bring ourselves thus to go outside of our constitutional duty, we would be compelled to choose many conflicting definitions. Section 288a of the Penal Code is void for uncertainty as well as for the reason that it is not expressed in the English language."

The two concurring opinions also point out that these terms have no definite significance and

are not intelligible enough to be the basis of criminal prosecution.

In *U. S. vs. Smith*, 5 Wheaton, 153, an Act of Congress referred to the law of nations for the definition of the crime of piracy. The question of the constitutionality of this statute was presented to the court, and in an opinion by Story, J., the Court held, first; that Congress had power to define and punish felonies on the high seas and offenses against the laws of nations, by virtue of one of the enumerated powers contained in the Constitution (Art. 1, Sec. 8, subdivision 10), and secondly; that piracy was well known at the common law, and that the law of nations used the term in no other sense than could be found in the treatises of the common law, page 159. The court observed, moreover, that the common law was part of the law of nations, page 161, and that since the definition of piracy under the law of nations was the same as that of the common law, the argument that the term was indefinite and vague was lacking in force. The dissenting opinion of Livingston, J., however, points out very clearly the constitutional infirmity of any statute which has as its basis principles of a code of law foreign to the common law. With what Livingston, J., says the majority opinion does not find fault; but the majority merely decides that the reference to the term piracy as understood by the Law of Nations was constitutional for the reasons just stated. Livingston, J., forcefully observes, pages 181 et seq.:

> "It would seem unreasonable to impose upon that class of men, who are the most liable to commit offenses of this description, the task of looking beyond the written law of their own country for a definition of them. *If in criminal cases everything is sufficiently cer-*

tain, which by reference may be rendered so, which was an argument used at bar, it is not perceived why a reference to the laws of China, or to any other foreign code, would not have answered the purpose quite as well as the one which has been resorted to. It is not certain, that, on examination, the crime would not be found to be more accurately defined in the code thus referred to, than in any writer on the law of nations; but the objection to the reference in both cases is the same; *that it is the duty of congress to incorporate into their own statutes a definition in terms, and not to refer the citizens of the United States for rules of conduct to the statutes or laws of any foreign country, with which it is not to be presumed that they are acquainted.* Nor does it make any difference in this case that the law of nations forms part of the law of every civilized country. This may be the case to a certain extent; but as to criminal cases, and as to the offense of piracy in particular, the law of nations could not be supposed of itself to form a rule of action, and therefore, a reference to it, in this instance, must be regarded in the same light, as a reference to any other foreign code" (Italics ours).

And again, page 182:

"Nor is there any hardship in this, for the great body of the community have it in their power to become acquainted with the criminal code under which they live; *not so when acts which constitute a crime are to be collected from a variety of writers, either in different languages, or under the disadvantage of translations, and from a code with whose provisions*

even professional men are not always acquainted. By the same clause of the constitution, congress have power to punish offences against the law of nations, and yet it would hardly be deemed a fair and legitimate execution of this authority to declare that all offenses against the law of nations, without defining any one of them, should be punished with death. Such mode of legislation is but badly calculated to furnish that precise and accurate information in criminal cases, which it is the duty and ought to be the object of every legislature to impart." (Italics ours.)

In *State vs. Smith*, 30 La. Ann., 846, a statute using the term "incest" was declared void, as being indefinite on the ground that the terms did not have a definite common law meaning, although the term might have a definite meaning under the canon law.

Practical difficulties in administration arises from the drastic and onerous provisions of these enactments. Hardships result from the operation of these statutes because of the lack of uniformity in the standard of guilt created. The enforcement of the laws differs with the different views of those authorities who are entrusted with their administration. The meaning of the laws differs with the different views of those experts who are called upon to express their opinion with respect to them.

Unlike our system of jurisprudence, where there are courts of final jurisdiction, there is no final authoritative reviewing body, under the Jewish law, whose decisions are considered as final, and whose authority is undisputed. Under certain circumstances which arise from day to day, the individual Rabbi is called upon to express his view, and his judgment might very well be opposed to that of another Rabbi leaving there a wide room for an hon-

est difference of opinion. The Jewish law of kosher contains such elements *as the reputation for observing the rituals and regulations* in the maintenance of a standard of kosher. This presents a most serious situation as regards practically all of the complainants in these suits.

Their kosher business has been a part of their entire business. Portions of their factory have been set apart for the manufacture of nonkosher materials for general sale. They find themselves in a situation where they painstakingly and earnestly observe all the ritual requirements that they can conceive of in the manufacture of their kosher foods. They attempt to comply with all the rules that can be found in the numerous sources of the bibliography of the laws of kosher, and yet possibly because of their work on the sabbath, or because in the same factory they manufacture nonkosher materials, or because their own orthodoxy or piety is in question, the Rabbi may refuse to give them a label of kosher to be attached to their kosher foods. No retailer would then purchase any of their foods as kosher, and any retailers who did would be deemed guilty of fraud if he sold it as kosher, when he had bought it without a kosher label. The product would then be prepared according to every possible minute detail of the Jewish law of which the complainants would have knowledge, and might, nevertheless, because of a discretionary individual judgment of the Rabbi or because of the character or religious views of the manufacturer or vendor, be deemed to be nonkosher.

Every day juries are instructed that they may infer or imply an intent to defraud from the acts and conduct of the accused. Never are they instructed that they may infer criminal acts or criminal conduct from the mere intent to defraud. The words "intent to defraud" are a very little help in

defining a crime unless the crime itself is clearly defined. The act itself must be defined and the line must be drawn. The presence of wilfulness in a statute or the element of a specific criminal intent does not save the statute if the substantive act complained of is not sufficiently set forth to apprise the accused of its contents. This was true of the Lever Act cases where a specific intent was necessary. The difference between guilty belief and guilty knowledge is ably pointed out in the case of *People vs. Jaffe*, 185 N. Y., 497, where the defendant believing that he was receiving stolen goods was found to be not guilty of the offense because the goods were in fact not actually stolen. A specific criminal intent furnishes no aid or assistance in defining or determining what a crime is so long as the substantive acts prohibited it are varying, uncertain, and indefinite.

After reading the foregoing under this head we are perhaps better qualified to approach a consideration in the decision in the case of *People vs. Atlas*, 183 A. D., 595, affirmed without opinion in 230 N. Y., 629. Distinctions between the *Atlas* case and the cases at bar are apparent upon the reading of the original law of 1915 as unamended, and contrasting with it the drastic, burdensome, and severe requirements of Chapters 580 and 581 of the Laws of 1922. Under the *Atlas* case there was merely a question of the right of the legislature to prevent the wilful simulation of a commodity. There was no absolute and positive obligation on the part of any person to post a sign of nonkosher on his window or to exhibit signs in his store over each piece of meat or meat preparation stating that certain meats were nonkosher. The 1915 statute merely was an enactment against wilful simulation. In so far as Chap-

ter 580 of the Laws of 1922 is concerned there is nothing in the decision of *People vs. Atlas* which is determinative of the question presented by this enactment. We have shown supra that under several subdivisions of this chapter no specific intent to defraud is necessary. The defense of good faith is unavailable. The defendant must accept the penalties of a statute based upon a set of facts, which, as we have shown, it is impossible for the defendant to know.

Aside from the consideration that a specific intent to defraud is not necessary under Chapter 580, a feature which immediately distinguishes the situation from the decision in the case of *People vs. Atlas*, there was no absolute affirmative requirement under the law of 1915, considered in *People vs. Atlas*, compelling a defendant to post a sign of not kosher and also to label certain meats not kosher. There was no prejudicial stigma, such as the word nonkosher carries with it, necessary under the 1915 law.

While it is quite true that one can readily conceive an extreme case of palpable fraud,—an instance where pork or ham is labelled and sold as kosher, there is no statute however vaguely drawn, however indefinite, which will not clearly cover an extremely exaggerated case. The Court will recognize that even under the Lever Act there could be no question but that a person purchasing an article for one dollar and selling it for one hundred dollars would be "wilfully and feloniously" exacting an unreasonable profit. Such an extremely abnormal situation would not be proof of the definiteness of the statute. The question considered in the Lever Law cases was whether the ordinary person could, with a reasonable degree of certainty, in the ordinary case, determine whether or not he was exacting an unreasonable or unjust profit.

In the *Atlas* case cited *supra*, the Appellate Division, in discussing the constitutionality of the statute, said, at page 597:

> "Counsel for the appellant argues that the word 'kosher' is an adjective, the definition and meaning of which involves a consideration of the Jewish orthodox religious requirements, which are not precise and definite, and concerning which, according to one witness, thousands of volumes have been written. It needs no argument to show that it is competent for the Legislature within its general police power to enact legislation to prevent and punish fraud and imposition. (Citing cases). If, therefore, the Legislature by the use of the word 'kosher' in this statute, meant something more than meat prepared under and of a product sanctioned by the orthodox Hebrew requirements, and the provisions of the statute for that reason would be too indefinite, still the information warranted the conviction of the defendant under the succeeding definite provisions of the statute, provided the evidence be sufficient. (Citing cases). It is manifest, however, that the Legislature did not intend to use the word 'kosher' in an indefinite sense, but evidently in the ordinary sense in which it is used in the trade, which is to designate meat as having been prepared under and of a product sanctioned by said religious requirements, and, therefore, as I view it, the Legislature has itself definitely defined the word 'kosher' as used in the statute. This construction leaves the statute sufficiently definite and confines it to those who, with intent to defraud, sell or expose for sale meat or meat preparation and falsely represent the same as having been pre-

pared under and of a product or products sanctioned by the orthodox Hebrew requirements."

We must confess our inability to comprehend the meaning of this paragraph, unless we assume that the Appellate Division took the position that the phrase "orthodox Hebrew religious requirements" is clear, precise, and definite, and easily found in an authoritative work in the English language. For that reason, they argued, if kosher means nothing more than compliance with orthodox Hebrew religious requirements, the word kosher must be clear and definite and readily ascertainable. For the purpose of argument, let us assume that kosher means compliance with orthodox Hebrew religious requirements. What are those requirements? Who can give those requirements a reasonable, common definition? Where are they to be found except in the thousands of volumes that have been written on the subject? Are they to be found in the multitude of customs, precedents, and traditions, of the oral, the written law, the commentaries, the codes, the responses of the Rabbis that have been handed down from the time of the Bible?

If the orthodox Hebrew religious requirements are so clear, why were they not set forth in the statutes? Why were they not enumerated in English so that he who reads may know the prohibitions of these criminal enactments?

It is one thing to have a vast body of traditional religious law, practice, and custom for the general guidance of the individual who is a member of that faith, and it is quite another thing to impose a jail sentence in the event of an infraction of one of these oral customs or traditions or precedents.

In a religious situation a man may very honestly give his best opinion and be in error. No serious

harm has been done from a religious viewpoint because if he finds out he is wrong, he can correct his conduct in the future, and if he does not, it is a matter between himself and his religious conscience. That same man making that same mistake, would, under a law of this kind, be subject to criminal prosecution, and upon trial his honest intentions would not be a matter between himself and his conscience, but for twelve men to pass upon, and their only guide would be the orthodox Hebrew religious requirements with all their volume, complexity, and difficulty to be ascertained.

The Appellate Division, in the opinion in *People vs. Atlas*, overlooked the inherent difficulty of the entire situation. The Appellate Division seemed to take it for granted that there are a definite bundle of rules or laws which are comprised within the phrase "orthodox Hebrew religious requirements." A mere reading of what has been set forth under this head, we respectfully submit, would seem to show conclusively that there is no such complete and authoritative definite set of rules or laws to be referred to as finally binding. There never has been any such comprehensive, finally authoritative definite set of rules or laws. From the very nature of the case there cannot be any such definite set of rules or laws, comprising as they do all of the customs, traditions, and precedents of the Jewish race stretching over a period of thousands of years, both oral and written, never comprehensively and adequately codified, never authoritatively stated, without a final reviewing body to settle the many controversial phases involved.

We do earnestly commend to this Court a serious consideration of Judge Page's dissenting opinion. He says, at page 601:

"The vice of the statute is clearly demonstrated by this information. The statute itself is so uncertain and ambiguous in its terms that no one can tell from reading it what the particular thing is that is prohibited. Nowhere is the word 'kosher' which is used in the statute defined * * *. These rules and regulations, he testified, were to be gathered from the Bible and from certain codes of Jewish law and a large body of precedents which had been established by the rulings of rabbis in response to questions that had been propounded, and he stated that the bibliography of the question of kosher filled several thousand great volumes. When the learned district attorney attempted in the information to define the specific acts which were necessary to show that the meat offered by the defendant was not kosher, there are more specifications omitted, because the district attorney confesses that they are unknown to him than are set forth with particularity."

The position we take before this Court is that these complainants have absolutely no desire to do anything but make honest and legitimate sales of their merchandise. They want to be permitted to label as kosher what they genuinely and honestly believe to be kosher insofar as they can ascertain what the requirements are, and insofar as it is humanly possible to comply with those requirements. In the modern state of affairs, it is almost impossible to comply with all of the minutiae of these requirements. For instance, it is impossible to trace a shipment from Chicago to New York so that one can be assured, with absolute certainty, that no one did any work on that shipment on the Sab-

bath. Similar difficulties can be multiplied by the hundreds. All that these complainants ask is that when they have done everything in their power to determine what is kosher and have finally labelled the article as kosher, that they should not thereby be placed in jeopardy of criminal prosecution for having failed to include one item or another, which is either incapable of performance under present modern conditions, or in which they might have made a mistake.

The Court will bear in mind that no one likes to be acquitted of a crime, and that it would be eminently unfair to any citizen to put him in a position where he *cannot know the law* until a jury says "guilty" or "not guilty." Our enlightened rules of criminal law must be of such character that the ordinary reasonably prudent man will know with reasonable certainty where the line is beyond which he may not go; that *a citizen should not be put in the position of having a jury draw that line for the first time by its verdict.*

Illustrative examples of statutes declared unconstitutional include the following:

In *Sogdell vs. The State*, 81 Texas Crim., 66, a section of the Penal Code provided that any manufacturer, importer, or agent, who sold any concentrated commercial feeding stuff with a label stating that the said feeding stuff contained "substantially" a larger percentage of protein, fat, or other ingredients, than was contained therein, was guilty of violating the section. The Court held that the term "substantially" was too vague and indefinite and that the statute was therefore void.

In *L. & N. R. Co. vs. Kentucky*, 99 Ky., 132, the Kentucky statute which provided that any railroad corporation which charged, collected, or received more than a just and reasonable rate of compensation shall be guilty of extortion, was held to be void

for uncertainty because of a failure to fix what was a just and reasonable rate by which the railroad could be governed in its conduct.

In *Ex Parte Andrew Jackson*, 45 Ark., 158, a statute which provided that it was criminal to "leave a wife and child without the means of support," was held to be too uncertain to be the basis of criminal prosecution.

In *People vs. Briggs*, 193 N. Y., 457, a penal statute which rendered it unlawful to sell milk as certified milk unless "conspicuously marked with the name of the association certifying it," was held unintelligible and therefore void.

POINT FIVE.

THE CASES RELIED UPON BY THE APPELLEES ARE DISTINGUISHABLE FROM THE CASES AT BAR.

The cases relied upon by the appellees can be easily distinguished. The first group deals with legislation calling for the labelling of definite facts such as weight, measure, ingredients, and quality. They define the standard article and fix its characteristics. The information sought is scientific, mathematical, exact, easily ascertainable, and readily reducible to scientific examination and analysis. Another group of cases deals with criteria or standards, upon which reasonable, sound, and prudent persons will be in a substantial accord in forming their judgments.

Under the first classification fall such cases as *Corn Products Refining Co. vs. Eddy*, 249 U. S. 427. In this case the statute required that a label be attached in a conspicuous place on each can sold or offered for sale with the word "compound" printed on each, stating definitely the percentage of each ingredient.

In *Hutchinson Ice Cream Co. vs. Iowa*, 242 U. S. 153, the statute prohibited the sale of ice cream containing less than a fixed per cent. of butter fat.

In *Hebe vs. Shaw*, 248 U. S. 297, the statute prohibited the manufacture or sale of condensed milk, unless it contained milk solids equal to a fixed percentage of those in crude milk, a certain percentage of such solids being fats.

In *Armour vs. North Dakota*, 240 U. S. 510, the statute required lard, not sold in bulk, to be put up in packages containing a specified number of pounds or even multiples thereof, to be labelled with the name and grade of the product, net weight, name, and address of producer or jobber.

Purity Extract Co. vs. Lynch, 226 U. S. 192, involved a statute which prohibited the sale of malt liquors.

In *Heath & Milligan vs. Worst*, 207 U. S. 338, the statute of North Dakota required manufacturers who sell certain enumerated paints to label them, showing percentages of mineral constituents.

In *Savage vs. Jones*, 225 U. S. 501, the statute provided that there should be fixed to every package a label or tag plainly showing the number of net pounds of the commodity in the package; the name, branch or trade-mark under which it was sold; the name and address of the manufacturer; and the guaranteed analysis stating the minimum percentage of fact and of protein contained therein.

There are certain other generic illustrations in the statutes such as fraudulently marking silver "sterling," New York Penal Law Section 422; or falsely marking articles "linen," Section 430; or failing properly to label mattresses, Section 444; or misrepresenting the pedigree of animals, Section 933. In each of the above the information to be labeled or branded were facts either within the

knowledge of the persons included within the provisions of the statutes or readily ascertainable, mathematical, and measurable and determinable facts. We did not have, as in the statutes before the Court, a standard of foreign law, customs, history, and institutions to be found by a jury upon a conflict of evidence, as to what was the law in a foreign system of jurisprudence.

A second group deals with statutes which contain standards of conduct or criteria of action which lead average, fair, impartial, ordinary, and prudent men to be substantially in accord in their conclusions.

U. S. vs. Standard Brewery, 251 U. S. 210, involved an indictment for selling beer which contained as much as one-half of one per cent. of alcohol. In the absence of a legislative definition of the word intoxicating, the Court held that it would not hold as a matter of law that such a percentage was intoxicating.

In *Ruppert vs. Caffey*, 251 U. S. 264, the Court held that where there was a legislative definition or standard of the word "intoxicating" that it would uphold the law. The difficulty of the varying standards of intoxicating liquors are set forth in great detail in the opinion. Where, however, the legislature has given its definition, the courts are able to apply it impartially and fairly. We respectfully submit that the holdings in the *Standard Brewery* case and the *Ruppert* case, cited *supra*, point out the difference between a varying standard to be applied and where the legislature has itself applied a criterion or standard.

Hamilton vs. Kentucky Distillery Co., 251 U. S., 146, merely involved the question as to whether the prohibition of the sale of distilled spirits is a proper exercise of the war power of Congress. No

question of the definition of any term was raised by this case.

In *Omaechevarria vs. Idaho*, 246 U. S. 343, the statute provided that any person having charge of sheep, which graze on any range previously occupied by cattle, was guilty of a misdemeanor. The prior possessory right was determined by priority in the usual and customary use of such range. The Court held that there would be little difficulty in determining the simple facts of the limits of a range and of customary occupancy. The Court, however, also specifically referred to the requirement of a specific intent on the part of the defendant. The Court says, at page 348:

> "Furthermore, any danger to sheepmen which might otherwise arise from indefiniteness, is removed by Section 6314 of Revised Codes, which provides that: 'In every crime or public offense, there must exist a union, or joint operation, of act and intent, or criminal negligence.'"

So far as Chapter 580 is concerned, where no specific intent or knowledge is required, the distinction is especially significant.

In *Miller vs. Strahl*, 239 U. S. 426, the statute provided that in case of fire, the hotelkeeper must give notice of the same to all guests and inmates thereof at once, and to do all in his power to save such guests and inmates. The statute here prescribed a rule of conduct about which reasonably would be in substantial accord.

Nash vs. U. S., 229 U. S. 373, involved the constitutionality of the Sherman Anti-Trust Act. The interpretation of this law, however, had reference to common law definitions and adjudications on restraint of trade. The body of the law was well

settled, and the particular violations of this statute were ascertainable by reference to the established precedents.

In *Waters Pierce Oil Co. vs. Texas*, 212 U. S. 86, the Court considered an act which denounced contracts and arrangements "reasonably calculated" to fix and regulate prices of commodities. The proscribed activity denounced by this law was similar to the familiar "attempt" of the common law.

In *Sligh vs. Kirkwood*, 237 U. S. 52, the statute of Florida made it unlawful to sell or deliver for shipment any citrus fruits, which were immature or otherwise unfit for consumption. Reasonable men would be substantially in accord in their judgment or determination as to whether certain citrus fruit was "otherwise unfit for consumption."

Not a single one of these cases incorporates conceptions and terms of a foreign body of law as a criterion of crime. Because of this, each case cited by the appellees is clearly distinguishable.

POINT SIX.

THE BRANDING OF ONE'S OWN PROPERTY WITH A STIGMA IS A DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW AND IS AN UNDUE AND UNREASONABLE BURDEN ON INTERSTATE COMMERCE.

The term "nonkosher" carries with it a pronounced stigma. It attaches to the commodity the idea of uncleanliness, unfitness, and inferiority. In a pamphlet entitled "Jewish Dietary Laws from a Scientific Standpoint," a study by N. E. Aronstam, M. D., the following passage appears on page 4:

> "In short, 'kosher' means wholesome and sanitary, while 'triefe' (not kosher) conveyes

> the idea of anything that is either directly unhealthy, malign, poisonous, and inefficient for the needs of the human body, or else that is indirectly capable of engendering ill consequences."

To the vast majority of the Jewish population the term "nonkosher" is a distinct reproach. The labeling of any commodity as "not kosher" is undeniably compelling the commodity to bear a badge of inferiority. In this respect an undue burden and a slander is placed upon the property. Insofar as it affects interstate commerce, there are authoritative cases which hold that a similar branding with stigmas, imposes unreasonable and undue burdens upon interstate commerce. Similarly insofar as it affects property rights it is also a denial of property without due process of law.

The burden of these statutes is extremely onerous and oppressive. The complainants are under a duty to label meats which are not kosher, according to the "orthodox Hebrew religious requirements" with a label that the same is "not kosher."

In doubtful cases the complainant is not certain whether the label that he posts is proper. Rather than face the penalties of a wrong choice, for safety's sake, he will take the lesser chance and label the goods "not kosher." In this way he not only loses the value of that particular meat but the clientele of a large number of customers who regard the other meat that he sells with suspicion, if part of the meat he sells is not kosher.

Important cases have already adjudicated that a statute which compels the branding of an article of commerce with a stigma, which annihilates its value and destroys its selling quality, is unconstitutional.

In *People vs. Hawkins*, 157 N. Y. 1, a statute required that all goods made by convict labor

should be labelled "convict made" and a violation of this law was made a misdemeanor. The defendant was indicted for offering for sale, with criminal intent, a certain scrubbing brush made by the labor of convicts confined in a prison of Ohio. The statute was held to be unconstitutional. The Court says, page 7:

> "The scrubbing brush in question was beyond all doubt an article of property in which the defendant could lawfully deal. He is forbidden, however, by this statute, under all the penalties of the criminal law, from buying or selling or having it in his possession, except upon the condition that he shall attach to it a badge of inferiority which diminishes the value and impairs its selling qualities."

And again at page 7:

> "The citizen cannot be deprived of his property without due process of law. The principle embodied in this constitutional guaranty is not limited to the physical taking of property. Any law which annihilates its value, restricts its use, or takes away any of its essential attributes, comes within the purview of this limitation upon legislative power. The validity of all such laws is to be tested by the purpose of their enactment and the practical effect and operation that they may have upon property. A law which interferes with property by depriving the owner of the profitable and free use of it, or hampers him in the application of it for his purposes of trade or commerce, or imposes conditions upon the right to hold or sell it, may seriously impair its value, against which the Constitution is a protection."

Freund, in his work on the Police Power, Sections 50 and 51, says, in commenting upon this case, that no man can be required to label his goods in such a way as to prejudice and destroy its value. He says in Section 51:

> "Perhaps the same objection applies to the requirement of marking goods 'tenement made' (Mass. Rev. Laws, Chap. 106, Sec. 58), unless it can be shown that such notice serves a valuable purpose, and the same principle should be generally applied to all notices where the requirement plainly indicates an attempt to harm a lawful business," and again,
>
> "Perhaps it should be said that even where the possibility of deception exists, the requirement of particular forms of notice is not legitimate, where others are adequate, and those insisted upon are plainly intended to prejudice."

In *Collins vs. New Hampshire*, 171 U. S. 30, 33, the statute required that oleomargarine be colored pink. The Court says (p. 33):

> "To color the substance as provided for in the statute naturally excites a prejudice and strengthens a repugnance up to the point of a positive and absolute refusal to purchase the article at any price. * * * Although under the wording of this statute the importer is permitted to sell oleomargarine freely and to any extent, provided he colors it pink, yet the permission to sell, when accompanied by the imposition of a condition which, if complied with, will effectually prevent any sale, amounts in law to a prohibition."

To the same effect is *State vs. Bruce*, 55 W. Va., 384, 387.

In *ex parte Hayden*, 147 Cal. 649, the California statute required that all fruits shipped or offered for shipment in that State should have stamped and labeled, on the outside of the box or package containing same, a statement accurately designating the county and the immediate locality in which such fruit was grown. The court declared it unconstitutional on the ground that an unjust stigma was attached to the commodities, which were the subject of legislation.

In *ex parte Foley*, 172 Cal. 744, a statute which required the seller of eggs to mark on each egg the word "imported," and to display in his place of business a conspicuous sign reading "Imported eggs sold here" was declared unconstitutional on the ground that this was an onerous and oppressive statute.

POINT SEVEN.

THE STATUTES ARE UNCONSTITUTIONAL BECAUSE THEY PROVIDE FOR AN UNREASONABLE CLASSIFICATION AND DENY TO PERSONS DEALING IN KOSHER AND NONKOSHER MEATS THE EQUAL PROTECTION OF THE LAWS.

This principle of constitutional law is a guarantee that no class of business men or dealers shall be arbitrarily singled out as the victims of oppressive legislation. We have seen that the legislation under consideration is unduly oppressive upon manufacturers, dealers, butchers, and delicatessen men who deal in kosher and nonkosher meat. They are singled out arbitrarily and made the subjects of severe and drastic legislation, which compels them to post a sign on their outside window and over their commodities which is prejudicial to their

business. These appellants are arbitrarily made the particular objects of such oppressive legislation. Insofar as Chapter 580 is concerned, not even a specific intent to defraud is necessary. We refer the Court's attention to the consideration of this point in *People vs. Atlas*, 183 A. D. 595, at page 598, where the Court says, with respect to the 1915 enactment:

> "It is also contended that the statute is unduly oppressive on dealers in meat. There would be force in that contention if mere proof of offering for sale or sale and the fact that it had not been so prepared would authorize a conviction; but as already observed, *intent* and *false* representation are essential ingredients of the crime."

The familiar principles of law are contained in the following authoritative cases:

Atchinson, Topeka & Santa Fe vs. Vosberg, 238 U. S. 56, 59;
Connolly vs. Union Sewer Pipe Co., 184 U. S. 540, 558, 559;
G. C. & S. Railway vs. Ellis, 165 U. S. 150, 155;
Cotting vs. Kansas City Stock Yards, 183 U. S. 79, 105;
Missouri vs Lewis, 101 U. S. 22, 31.

POINT EIGHT.

ANY STATE STATUTE WHICH DIRECTLY AND SUBSTANTIALLY INTERFERES WITH INTERSTATE COMMERCE VIOLATES THE COMMERCE CLAUSE OF THE CONSTITUTION.

The burden upon interstate commerce of these appellants is unduly drastic. The meat prepara-

tions of the Lewis & Fox Co. are resold in the State of New York in their original packages, and as such are entitled to the protection of the commerce clause of the Constitution.

See *Hipolite Egg Co. vs. U. S.*, 220 U. S. 45, 54;
Rhodes vs. Iowa, 170 U. S. 412, 423.

The drastic requirement concerning the posting of signs and the labeling of each piece of commodity directly interferes with the interstate shipments. Thousands of minutiae as detailed above attach with every step of the passage from the original selection of the live animal up to ultimate consumption. Any deviation, in the slightest detail, from the strictest scruple can change the quality of the meat, with its resultant criminal consequences. Then there is utter impossibility of knowing the true facts through processes and journeys so complex and numerous. Any drastic and oppressive legislation, which interferes with interstate commerce violates the commerce clause of the Constitution. This Court has so held in numerous authoritative cases.

In *Railroad Co. vs. Husen*, 95 U. S. 465, the Court had under consideration a statute of Missouri which prohibited the driving or conveying of any Texas, Mexican, or Indian cattle, between March 1st and November 1st. It was held to be in conflict with the commerce clause on the ground that the act was a direct burden on interstate commerce.

In *Voight vs. Wright*, 141 U. S. 62, a statute which required that all flour brought into the State of Virginia should have the Virginia mark of inspection, and imposing penalties for violation thereof, was held to be a substantial interference with interstate commerce.

In *Minnesota vs. Barber*, 136 U. S. 313, the Minnesota statute provided for inspection of animals, in that state, twenty-four hours before slaughtering. The practical effect of the operation of the statute was to exclude from Minnesota all fresh meat taken from animals slaughtered in other states. The act was declared unconstitutional in that it was deemed a substantial restriction upon interstate commerce.

In *Brimmer vs. Rebman*, 138 U. S. 78, a Virginia statute declared it unlawful to offer for sale within the limits of the State any meat from animals slaughtered one hundred miles or more from place at which it was offered for sale, unless previously inspected and approved by local inspectors. The law was held to be a substantial interference with interstate commerce.

See also:

People vs. Hawkins, 157 N. Y. 1;
Opinion of Justices, 211 Mass. 605;
Schollenberger vs. Pennsylvania, 171 U. S., 1;
Collins vs. New Hampshire, 171 U. S., 30.

POINT NINE.

THE DECREES OF THE COURT BELOW DENYING THE APPLICATIONS FOR PRELIMINARY INJUNCTIONS AND GRANTING THE MOTIONS TO DISMISS THE BILLS OF COMPLAINT SHOULD BE REVERSED.

Respectfully submitted,

DAVID L. PODELL,
Attorney for Appellants.

DAVID L. PODELL,
BENJAMIN S. KIRSH,
Of Counsel.

TABLE OF CONTENTS.

CASES CITED.

Argued by

SAMUEL H. HOFSTADTER.

Supreme Court of the United States

OCTOBER TERM, 1924.

HYGRADE PROVISION CO., INC., E. GREENBAUM CO., INC., and GUCKENHEIMER & HESS, INC., *Appellants,* *against* CARL SHERMAN, as Attorney General of the State of New York, and JOAB H. BANTON, as District Attorney of the County of New York, *Appellees.*	No. 104.
LEWIS & FOX COMPANY, *Appellant,* *against* THE SAME, *Appellees.*	No. 105.
HARRY SATZ, *Appellant,* *against* THE SAME, *Appellees.*	No. 106.

BRIEF ON BEHALF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK, APPELLEE.

Statement.

These are bills in equity brought by the five complainants above named against the Attorney General of the State of New York and the District Attorney of the County of New York to enjoin the enforcement of certain statutes of the State of New York designed to prevent frauds in the sale of food products as kosher. The complainants moved for a temporary injunction under Section 266 of the Judicial Code before a statutory district court of three judges. The defendants made cross-motions to dismiss the bills.

The District Court unanimously denied the motions for an injunction and granted the motions to dismiss, in an opinion printed at pages 28 to 33 of the record in No. 403.

It is noteworthy that although all the complainants insist that their business is being irreparably damaged by the statutes in question, the present suits were instituted eight months after the statutes were enacted and over four months after they took effect; and although the opinion of the District Court denying a preliminary injunction and dismissing the bills was handed down March 22nd, 1923, these cases have not been brought on in this Court until now, over a year and a half after the decision by the District Court, and nearly two years after the bringing of the bills.

Counsel for the appellants are in error in stating that the allegations of the bills are uncontroverted. As a matter of pleading, this may be true, but it is certainly not true as far as regards the motions for preliminary injunctions. Upon these motions answering affidavits were submitted controverting the essential allegations of the bills.

History of the Statutes Involved.

By Chapter 233 of the Laws of 1915, the Legislature of the State of New York added to Section 435 of the Penal Law, which is entitled "False labels and misrepresentations in the sale of food products," a new subdivision "4" which, together with the introductory phrase and concluding phrase of the entire section, reads as follows:

> "A person, who, with intent to defraud:
>
> * * * * * *
>
> 4. Sells or exposes for sale any meat or meat preparation and falsely represents the same to be kosher or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements; or falsely represents any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon the word 'Kosher' in any language,
>
> Is guilty of a misdemeanor."

It has been held by the highest Court of New York that the introductory phrase, "A person, who, *with intent to defraud,*" is intended to apply to the entire section, and hence to this subdivision of it (*People* v. *Atlas,* 183 App. Div., 595, 598, affirmed, 230 N. Y., 629).

The constitutionality of this subdivision was challenged by a defendant in a prosecution instituted under it in the State Courts, but it was sustained by the Appellate Division and the Court of Appeals (*People* v. *Atlas, supra*).

By Chapter 581 of the Laws of 1922, this subdivision was further amended to read as follows:

"A person, who, with intent to defraud:

* * * * * *

4. Sells or exposes for sale any meat or meat preparation and falsely represents the same to be kosher, or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements; or falsely represents any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon the word 'kosher' in any language; or sells or exposes for sale in the same place of business both kosher and nonkosher meat or meat preparations who fails to indicate on his window signs and all display advertising, in block letters at least four inches in height, 'kosher and nonkosher meat sold here;' or who exposes for sale in any show window or place of business both kosher and nonkosher meat or meat products who fails to display over such meat or meat preparation so exposed a sign in block letters at least four inches in height reading 'kosher meat,' or 'nonkosher meat,' as the case may be,

Is guilty of a misdemeanor."

The Court will note that the amended subdivision, down to the words "in any language," is identical, word for word, with the original subdivision, the amendment consisting of the addition of the subsequent words. The Court will also observe that the general provision of Section 435, limiting the operation of that section to persons who do the various acts prohibited "with intent to defraud," is applicable to this amended subdivision, which is still a part of that section.

At the same time the Legislature also enacted Chapter 580 of the Laws of 1922, inserting a new Section "435-a" of the Penal Law, reading as follows:

> "SALE OF KOSHER MEAT AND MEAT PREPARATIONS. A person, who, *with intent to defraud,* sells or exposes for sale any meat or meat preparation and falsely represents the same to be kosher whether such meat or meat preparation be raw or prepared for human consumption, or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements; or falsely represents any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon the word 'kosher' in any langauge; or sells or exposes for sale in the same place of business both kosher and nonkosher meat or meat preparations, either raw or prepared for human consumption, who fails to indicate on his window signs and all display advertising in block letters at least four inches in height, 'kosher and non-kosher meat sold here;' or who exposes for sale in any show window or place of business both kosher and nonkosher meat or meat preparations, either raw or prepared for human consumption, who fails to display over each kind of meat or meat preparation so exposed a sign in block letters at least four inches in height reading 'kosher meat,' or 'nonkosher meat,' as the case may be, is guilty of a misdemeanor."

The differences between Chapter 580 and Chapter 581 are purely verbal and of no substantial importance, so that the Court may confine its attention to either of these statutes. Chapter 580, as

well as Section 435 of the Penal Law as amended by Chapter 581, begins with the limiting phrase:

"A person, who, with intent to defraud."

We shall have occasion later to refer to the extended argument of the learned counsel for the appellants that the statutes differ in that one of them requires an intent to defraud while the other does not. For the present it will suffice to remark that both of the prosecuting officers of the State of New York whose threats the complainants fear interpret both statutes as punishing only conduct with an intent to defraud, and that the District Court unanimously concur in this interpretation (*Record, fol.* 69 *).

The occasion for the 1922 amendments was as follows: It is usual for retail dealers in kosher meats to have a sign on the windows of their shops indicating that kosher meats are sold there. From these signs, the public naturally infers that only kosher products are sold in the shops the windows of which bear such signs. In *People* v. *Goldberger*, 168 N. Y. Supp., 578, however, the Court of Special Sessions of the City and County of New York held that such a sign was not, under the terms of the statute as it then existed, a representation that *all* the meat sold in the shop was kosher; and that consequently a conviction could not be had under the then existing law without a showing that the dealer had made a representation with respect to

* The three cases were argued together. With minor variations the records are identical. Unless otherwise indicated, all references will be made to the record in No. 403.

the specific piece of meat shown not to be kosher. It was to remedy this situation, and to prevent the actual deception of purchasers which would as a practical matter be immune from punishment under the *Goldberger* case, that the 1922 amendments were enacted. Their effect is to continue the prohibition against selling as kosher any food product which is not kosher, with intent to defraud, and to add a prohibition against the sale of both kosher and nonkosher meat preparations in the same shop, with intent to defraud, and without indicating by an appropriate sign that both kosher and non-kosher products are dealt in, and labelling each article sold or exposed for sale, "kosher" or "non-kosher," as the case may be.

The Opinion of the District Court.

The salient parts of the opinion below are as follows:

* * * * * *

> "The effect of these statutes is to continue the prohibition of selling, as kosher, any food product which is not kosher with intent to defraud and to add a prohibition against the sale of both kosher and non-kosher meat preparations in the same shop with intent to defraud when not indicating, by an appropriate and described sign, that both kosher and non-kosher products are dealt in, anl labeling each article sold or exposed for sale. * * *
>
> "It is evident from a reading of these statutes that it was the intention of the New York Legislature to specifically make an intent to defraud an essential element of the offense created. It was to prevent fraud and imposition in the sale of meat for the

orthodox Hebrew religious population that the legislation in question was enacted. The State legislatures have long been held competent to enact laws intended to prevent fraud and imposition. A State statute requiring all compound syrups to be labeled conspicuously with the percentage of each ingredient, naming the preponderating ingredient first, is one for the prevention of adulteration and fraud, and the manufacturer has no constitutional right to sell goods without giving to the purchaser such fair information as commanded by that statute. (Corn Products Refining Co. v. Eddy, 249 U. S. 427.) A statute which prohibits the sale of ice cream containing less than a specified percentage of butter fat, although the product sold was concededly wholesome, is a law designed to prevent persons from being misled to the weight, measure, quality or ingredients of the article of general consumption, and it is within the police power of the State to so legislate. (Hutchison Ice Cream Co. v. Iowa, 242 U. S. 153.) A statute requiring lard to be labeled 'black lard' or 'intestinal lard' so as to prevent the public from being misled as to the quality purchased, is not in violation of the rights of the State legislature. (Armour v. North Dakota, 240 U. S. 510.) Where the evident purpose of the statute is to prevent fraud and imposition in the sale of food for domestic animals, which is deemed a matter of great importance to the State, and where its terms are directed to that end, they are not unreasonable. (Savage v. Jones, 225 U. S. 501.)

"The complainants urge that they have built up a large and profitable business in the sale of kosher meat products. Their business, as they have created it, must of

necessity be on the faith of their customers, orthodox Hebrews, to whom kosher meat is well known and understood. The meat products become desirable to them only when prepared, cured and sold under the method of their religious training. Complainants say they have long sold kosher meat products and it must be that the term 'kosher' has long been understood by them. The authorities of Hebraic law may differ as to what should be done in the slaughtering and curing of these meat products. The variation of opinion as to what acts are to be performed and what conduct is to be followed in preparing and caring for kosher meat, will not render the statute uncertain or vague. (United States v. Standard Brewery, 251 U. S. 210; Hamilton v. Kentucky Distilleries, 251 U. S. 146.)

"But under the statute, there must appear, in order to convict of the crime, an act and intent to defraud, and because of this there can be no such indefiniteness as to violate the guaranty by the Fourteenth Amendment of due process of law. (Omaechevarria v. Idaho, 246 U. S. 343.) In Heath & Milligan Co. v. Worst (207 U. S. 338), the Supreme Court considered a penal statute of North Dakota prohibiting the sale or exposure for sale of any paint containing any ingredient other than pure linseed oil, pure carbonate of lead, oxide of zinc, turpentine, Japan dryer and pure colors, unless the paint was properly labeled with a label showing the percentage of each ingredient not specified and the name and residence of the manufacturer. It was there said, where the objection of indefiniteness and vagueness was presented in the use of the phrase 'pure colors':

'We regard these criticisms answered by our general discussion, and we have specially noticed them that it may not be thought we have overlooked them. They may emphasize what we have already said as to the possible imperfection of the classification of the statute. It must not be forgotten, however, that inaccuracies of definition may be removed in the administration of the law. And it must be borne in mind that the use of the non-enumerated ingredients is not forbidden nor the advantages of the practical tests and scientific research made by appellants taken away from them. The sole prohibition of the statute is that those ingredients shall not be used without a specific declaration that they are used—a burden maybe, but irremediable by the courts—maybe, inevitable, in legislation directed against the adulteration of articles or to secure a true representation of their character or composition.'

"Nor do we think that the statute affects interstate commerce so as to be an unwarranted interference thereof. The burden of the statute is to prevent fraud and imposition in the sale of kosher meats, which the legislature of the State in its wisdom thought to require protection. In no sense is it aimed at interstate commerce. It does not discriminate against interstate commerce. It promotes honest dealing by merchants dealing in kosher meat. While the State cannot, under the claim of exerting its police powers, undertake what is essentially a regulation of interstate commerce, or impose a direct burden upon that commerce, still when the local regulation has a real relation to the suitable protection to the people of the State, and is reasonable

in its requirements, it is not invalid because it may incidentally affect interstate commerce, provided it does not conflict with legislation enacted by the Congress pursuant to its constitutional authority. (Savage v. Jones, 225 U. S. 501; Sligh v. Kirkwood, 237 U. S. 52; Amos Bird Co. v. Thompson, 274 Fed. 702.)

"Legislation in a great variety of ways may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Federal Constitution. Legislation of a State not directed against commerce or any of its regulations, but relating to the rights, duties and liabilities of citizens, and only indirectly and remotely affecting the operation of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuits. (Plumley v. Mass., 155 U. S. 461.)

"The Court of Appeals of the State of New York has held that the use of the word 'kosher' used in the statute, is used in no indefinite sense, but by its ordinary meaning as such term is used in the trade. It is to designate meat as having been prepared under, and a product sanctioned by the orthodox Hebrew religious requirements, and thus the legislature has definitely defined the word 'kosher' as used in the statute. (People v. Atlas, 183 App. Div. 595; affd. 230 N. Y. 629.)

"We think that the attack made upon this statute must fail, and that the statute in no way is legislation in contravention of the Federal Constitution.

"The applications for preliminary injunctions are denied, and the motions to dismiss the complaints are granted."

POINT I.

The statutes in suit are designed to prevent fraud and misrepresentation, and are clearly within the police power of the State of New York.

In *People* v. *Atlas,* 183 App. Div., 595, affirmed 230 N. Y., 629, the Court said (p. 597), in sustaining the constitutionality of the original statute of 1915:

> "It needs no argument to show that it is competent for the Legislature within its general police power to enact legislation to prevent and punish fraud and imposition."

This statement is so amply supported by decisions of this Court that it would be pedantic to cite them all here. A reference to a few of the cases showing the wide latitude which this Court has given to the State police power, however, may be helpful.

In *Corn Products Refining Co.* v. *Eddy,* 249 U. S., 427, the Court had under consideration a Kansas statute requiring all compound syrups to be labelled conspicuously with the percentage of each ingredient, naming the preponderating ingredient first. The Court upheld the statute as one for the prevention of adulteration and fraud, saying at page 431:

> "It is too plain for argument that a manufacturer or vendor has no constitutional right to sell goods without giving to the purchaser fair information of what it is that is being sold."

In *Hutchinson Ice Cream Co.* v. *Iowa,* 242 U. S., 153, the Court upheld a statute prohibiting the sale of ice cream containing less than a specified percentage of butter fat, although the product sold by the plaintiff in error, which contained less than that percentage, was concededly wholesome, saying at page 159:

> "Laws designed to prevent persons from being misled in respect to the weight, measurement, quality or ingredients of an article of general consumption are a common exercise of the police power."

In *Armour* v. *North Dakota,* 240 U. S., 510, a State statute required lard to be put up in packages containing a specified number of pounds net weight or even multiples thereof, the purpose being to prevent the public from being misled as to the quantity purchased; and also provided that if the lard was other than leaf lard, it must be labelled "Black Lard" or "Intestinal Lard," as the case might be. The Court sustained the statute, saying at page 513:

> "We said but a few days ago that if a belief of evils is not arbitrary we cannot measure their extent against the estimate of the legislature, and there is no impeachment of such estimate in differences of opinion, however strongly sustained. And by evils, it was said, there was not necessarily meant some definite injury but obstacles to a greater public welfare. Nor do the courts have to be sure of the precise reasons for the legislation or certainly know them or be convinced of the wisdom or adequacy of the laws."

In *Savage* v. *Jones,* 225 U. S., 501, the Court had under consideration an Indiana statute requiring

everyone selling concentrated foodstuffs for animals to affix a tag or label plainly printed in the English language giving the number of net pounds, the name and place of business of the manufacturer, and a guaranteed analysis, before selling or offering any article for sale. It also required the manufacturer or dealer to file with the State Chemist a certificate stating his name, office address, brand dealt in and ingredients of the brand, and to affix to each package a stamp showing that the article had been duly registered with the State Chemist. The Court sustained the statute as a valid police regulation, saying, at page 524:

> "The evident purpose of the statute is to prevent fraud and imposition in the sale of food for domestic animals, a matter of great importance to the people of the State. Its requirements were directed to that end, and they were not unreasonable."

See also *Hebe Co.* v. *Shaw,* 248 U. S., 297 (sustaining statute prohibiting condensed milk made from skimmed milk); *Rast* v. *Van Deman & Lewis,* 240 U. S., 342 (sustaining statutory prohibition of trading stamps on the ground that they may be considered "by an appeal to cupidity a lure to improvidence" and as having "the seduction and evil" of a lottery); *Purity Extract Co.* v. *Lynch,* 226 U. S., 192 (sustaining a State statute prohibiting the sale of non-alcoholic malt liquors, on the ground that their sale might make more difficult the enforcement of the prohibition against intoxicating liquors); *Murphy* v. *California,* 225 U. S., 623 (sustaining a statute prohibiting billiard halls, on the ground that they may have a harmful tendency);

Otis v. *Parker,* 187 U. S., 606 (sustaining a statutory prohibition of the purchase or sale of stocks on margin, on the ground that it may lead to improvident speculation); *Booth* v. *Illinois,* 184 U. S., 425 (sustaining a statute prohibiting the sale of options for the future purchase of grain or other commodities, on the same ground).

As to the equal protection of the laws, see *Crescent Oil Co.* v. *Mississippi* (257 U. S., 129, 137); *Oliver Iron Co.* v. *Lord* (262 U. S., 172, 178); *Heisler* v. *Thomas Colliery Co.* (260 U. S., 245, 255).

Under the principle of these cases, and of many others decided by this Court, the statutes under attack are a plainly valid exercise of the police power of the State of New York.

Circuit Judge MAYER said, when serving as Attorney General of the State of New York, years before the statutes now in suit were ever thought of (*Opinions of New York Attorney General* [1906], pp. 454-456):

> "It is a matter of common knowledge that there are about 500,000 Orthodox Jews in the City of New York. These inhabitants of the City of New York adhere to the Mosaic rites in regard to the slaughtering of cattle. * * * A person of the Jewish religion thus observing these Orthodox Mosaic rites, would not buy or consume food from cattle killed in any other manner. The meat which is the result of such slaughtering is well known as 'kosher meat.'"

In this connection, it is of interest to note that as long ago as *1796,* and again in *1805,* the Common Council of the City of New York revoked the

licenses of two butchers, Nicholas Smart and Caleb Vandenburg, for affixing a kosher seal to meat that was not in fact kosher, and that in 1813 there was for a short time in force in the City of New York an ordinance prohibiting the sale of meat as kosher unless it was killed under license from a Jewish congregation of the City of New York (see "The Question of the Kosher Meat Supply in New York City in 1813, with a Sketch of Earlier Conditions," by Samuel Oppenheim; Publications of the American Jewish Historical Society No. 25, 1917). It is proper to consider historical practices of this sort in determining the constitutionality of a statute (*Ownby* v. *Morgan*, 256 U. S., 94, and see *Crane* v. *Hahlo*, 258 U. S., 142, 147).

Indeed, by the complainants' own showing, there is an extensive demand in the State of New York for kosher meat products. The hundreds of thousands of persons who desire kosher meat for their daily use are entitled to the assurance of good faith, which is all that the statutes exact, in the supplying of that demand.

Extensive hearings before the legislative committees prior to the enactment of both the original and the amendatory statutes, as well as the hearings held before Governor MILLER before his signature of the bills enacting into law the present statutes, have demonstrated the widespread misrepresentations and frauds committed by the purveyors of kosher meats and preparations on an unsuspecting public which, having paid a higher price than ordinary meats commanded, found that it had not received what it bargained for, and what in good faith it was entitled to receive. The public injured by these frauds is not necessarily restricted to any particu-

lar class of the population, for, as was pointed out in the opinion sustaining the constitutionality of the 1915 law (*People* v. *Atlas*, 183 App. Div., 595, 596-597, affirmed 230 N. Y., 629):

> "The statute does not limit the sale of such meat to orthodox Jews. The sale thereof is open to the public. The purpose of the statute, manifestly, is to prevent and punish fraud in the sale of meats or meat preparation, and it only operates on those who knowingly violate its provisions, for it is expressly provided that there must be both an intent to defraud and a false representation. * * * It may be that those principally interested in the subject-matter of the legislation are of the Jewish faith, but the benefits of the statute are not confined to them, for it is evident that others of the general public may be interested in knowing that greater care and cleanliness have been observed in the selection and slaughter of the animals the meat of which is so known, marked or labeled, than is otherwise exercised."

This legislation is justified in the public interest. It affects hundreds of thousands of citizens of this State who, following the firmly-rooted religious convictions of their ancestors from biblical times, regard the observance of the Jewish ritual requirements with respect to meat and meat products as a matter of conscience. Whatever violates these conscientious convictions, either by force or by fraud, is a matter of public interest and affects the well-being and good order of the State.

It is within the police power of the State to protect those who would be most cruelly deceived into the commission of what they believe to be sin, by

preventing such frauds. It is certainly as important to do so as it is to prevent fraud by selling silver marked as "sterling" when, in fact, it is not (New York Penal Law, Sec. 422); or by falsely marking articles "linen" (*id.*, Sec. 430); or by failing properly to label mattresses (*id.*, Sec. 444); or by misrepresenting the pedigree of animals (*id.*, Sec. 933); or by failing to label with a correct chemical analysis food for domestic animals (*Savage* v. *Jones*, 225 U. S., 501).

POINT II.

The statutes in suit do not unconstitutionally interfere with interstate commerce.

Complainant Satz carries on a general delicatessen and provision supply business in New York. He claims that he purchases a considerable portion of the meats in which he deals from packers outside of the State of New York, and that he resells them in their original packages.

Complainant Lewis & Fox Co. is a provision manufacturer in the State of Massachusetts. It alleges that a considerable part of its business consists in shipments into and through the State of New York.

Complainants Hygrade Provision Co., Inc., E. Greenbaum Co., Inc., and Guckenheimer & Hess, Inc., are engaged in the purchase, sale and preparation of meat within the State of New York. They allege that they ship a considerable proportion of their products into other States of the Union.

All the complainants contend that the statutes constitute an unconstitutional interference with interstate commerce.

We have seen under the last point that the statutes in question are intended and designed to protect the citizens of the State of New York against fraud in sales and transactions within the State, and that as such their constitutionality is amply sustained by the authorities. The cases are equally clear to the effect that valid police regulations of this sort will not be held unconstitutional even though they may incidentally affect interstate commerce.

In the cases of *Corn Products Refining Co.* v. *Eddy,* 249 U. S., 427, *Armour & Co.* v. *North Dakota,* 240 U. S., 510, and *Savage* v. *Jones,* 225 U. S., 501, all of which cases were cited under the preceding point, the statutes in question were attacked not only as a deprivation of property without due process of law, but also as an unwarranted interference with interstate commerce. In each of these cases this Court overruled the latter contention as well as the former, and held the statutes involved constitutional.

The leading case is *Savage* v. *Jones, supra,* in which Mr. Justice HUGHES, writing for the unanimous Court, said (pp. 524-525):

> "The evident purpose of the statute is to prevent fraud and imposition in the sale of food for domestic animals, a matter of great importance to the people of the State. Its requirements were directed to that end, and they were not unreasonable. It was not aimed at interstate commerce, but with out discrimination sought to promote fair dealing in the described articles of food.

> "The State cannot, under cover of exerting its police powers, undertake what amounts essentially to a regulation of interstate commerce, or impose a direct burden upon that commerce. *Railroad Co.* v. *Husen*, 95 U. S. 465, 475; *Walling* v. *Michigan*, 116 U. S. 446; *Bowman* v. *Chicago &c. Ry. Co.*, 125 U. S. 465; *Leisy* v. *Hardin*, 135 U. S. 100; *Minnesota* v. *Barber*, 136 U. S. 313; *Brimmer* v. *Rebman*, 138 U. S. 78; *Scott* v. *Donald*, 165 U. S. 58; *Schollenberger* v. *Pennsylvania*, 171 U. S. 1, 13; *Houston & Texas Central R. R. Co.* v. *Mayes*, 201 U. S. 321; *Atlantic Coast Line* v. *Wharton*, 207 U. S. 328; *Adams Express Co.* v. *Kentucky*, 214 U. S. 218. *But when the local police regulation has real relation to the suitable protection of the people of the State, and is reasonable in its requirements, it is not invalid because it may incidentally affect interstate commerce, provided it does not conflict with legislation enacted by Congress pursuant to its constitutional authority.*"

In *Sligh* v. *Kirkwood*, 237 U. S., 52, the Court had under consideration a statute of Florida prohibiting the delivery for shipment of any citrus fruit which is immature or otherwise unfit for consumption.

The particular transaction for which the plaintiff in error was convicted by the State Court was a shipment in interstate commerce. This Court nevertheless sustained the conviction, saying at page 61:

> "It may be taken as established that the mere fact that interstate commerce is indirectly affected will not prevent the State from exercising its police power, at least

> until Congress, in the exercise of its supreme authority, regulates the subject. Furthermore, this regulation cannot be declared invalid if within the range of the police power, unless it can be said that it has no reasonable relation to a legitimate purpose to be accomplished in its enactment; and whether such regulation is necessary in the public interest is primarily within the determination of the legislature, assuming the subject to be a proper matter of state regulation."

In *Amos Bird Co.* v. *Thompson,* 274 Fed., 702, the Court had under consideration a State statute requiring eggs imported from foreign countries to be labelled "foreign eggs" in letters at least two inches high, and restaurants using such eggs to have posted in a conspicuous place a sign in letters at least four inches high, "We use foreign eggs here." This statute was held to be a valid police regulation, and not in conflict with the power of the Federal Government over interstate commerce.

In *Silz* v. *Hesterberg,* 211 U. S., 31, this Court had under review a statute of the State of New York prohibiting the possession of game during the closed season. The plaintiff in error was convicted for having in his possession game imported from another State which had been acquired without any violation of the laws as to killing game. The Court sustained the conviction, holding that the statute might not be held unconstitutional merely because it incidentally affected interstate commerce.

Crossman v. *Lurman,* 192 U. S., 189, involved a statute of the State of New York prohibiting the

possession or sale within the State of New York of any adulterated article of food, and specifically defined as adulteration the coloring of any article of food so as to conceal damage or defect. The plaintiff in error sold the defendant in error 500 bags of coffee for shipment, by steamer, from Rio Janeiro to New York. Upon the arrival of the coffee in New York, the purchaser rejected it on the ground that certain beans had been colored to conceal a defect, and that hence the coffee was adulterated within the meaning of the New York statute. This Court, in a unanimous opinion by Mr. Justice WHITE, said (p. 197), quoting from the opinion in *Plumley* v. *Massachusetts,* 155 U. S., 461, 472:

> "If there be any subject over which it would seem the States ought to have plenary control, and the power to legislate in respect to which it ought not to be supposed was intended to be surrendered to the general government, it is the protection of the people against fraud and deception in the sale of food products. *Such legislation may, indeed, indirectly or incidentally affect trade in such products transported from one State to another State. But that circumstance does not show that laws of the character alluded to are inconsistent with the power of Congress to regulate commerce among the States.* For, as said by this court in *Sherlock* v. *Alling,* 93 U. S. 99, 103: 'In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways,

> may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution. * * * *And it may be said generally, that the legislation of a State, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or interstate, or in any other pursuit.'"

See also *Oliver Iron Co.* v. *Lord* (262 U. S., 172, 178), holding that mining is subject to State regulation even though the products of the mine may be shipped by interstate commerce.

These cases incontrovertibly establish the proposition that incidental to the well-recognized power of the State to protect its citizens from deception and fraud at the hands of vendors, it may pass statutes requiring truthful labeling of food products, including those which are concededly wholesome, and that such statutes are not invalidated by the fact that they may incidentally affect interstate transactions. The statutes at bar are directly within the reasoning of these cases, and the objection urged that they interfere with interstate commerce must therefore fail.

POINT III.

The statutes at bar specifically require an intent to defraud. In any event, they are sufficiently definite to be easily understood and followed. The complainants have no standing to bring the present suits, and the bills of complaint are without equity.

We have pointed out in our analysis of the statutes (*supra*), that both of them specifically make intent to defraud an essential element of the offense created. Indeed, even if such intent were not expressly required, it would be implied (*Baender* v. *Barnett*, 255 U. S., 224; *Verona Central Cheese Co.* v. *Murtaugh*, 50 N. Y., 314).

Appellants devote a considerable part of their argument to the proposition that Section 435a of the Penal Law punishes acts done without any intent to defraud. The argument is based on a labored interpretation of the statute, which is rested solely upon the supposed effect of the punctuation of the statute. The argument is unsound in both of its premises.

In the first place, even as a purely verbal matter the punctuation of the statute does not support the construction put on it by the appellants. And in any event, punctuation is resorted to in the interpretation of statutes only when no other principle or rule of interpretation is applicable.

In the instant case we have two controlling rules of interpretation establishing the proposition that neither statute punishes acts done without an in-

tent to defraud. The first is that unless the legislative intent is clearly expressed to the contrary, a criminal statute will never be interpreted so as to punish innocent acts. The second is that in the absence of authoritative decisions of the State Court (and there are none in the case at bar), the Federal Courts will never interpret a State statute so as to render it unconstitutional or even so as to make its constitutionality doubtful, if this result can possibly be avoided by another interpretation of the statute.

Appellants' counsel would have this Court interpret Section 435a so as to punish innocent acts (and such an interpretation, it must be conceded, is, to say the least, a doubtful one) and then strike it down as unconstitutional because it punishes innocent acts. This, this Court has frequently had occasion to declare, is just what the Federal Courts will never do.

The decision in *Baender* v. *Barnett* is highly instructive. The offense for which the plaintiff in error was convicted in that case was the possession of dies in the similitude of those used by the United States Government for making coins. As originally enacted, the statute against the possession of such dies had specifically required an "intent to fraudulently or unlawfully use the same" as an element of the offense. *By an amendment passed prior to the offense for which the plaintiff in error was convicted, however, this express requirement was eliminated from the statute.* The plaintiff in error was indicted for "wilfully and knowingly," having in his possession such a die. He pleaded guilty, but sued out a writ of *habeas corpus,* upon the ground that the statute punished

the innocent possession of such a die, and hence was unconstitutional.

This Court unanimously sustained the conviction, saying at pages 225-226:

> *"The statute is not intended to include and make criminal a possession which is not conscious and willing. While its words are general, they are to be taken in a reasonable sense and not in one which works manifest injustice or infringes constitutional safeguards. In so holding we but give effect to a cardinal rule of construction recognized in repeated decisions of this and other courts.* A citation of three will illustrate our view. In *Margate Pier Co.* v. *Hannam,* 3 B. & Ald. 266, 270, ABBOTT, C. J., quoting from Lord Coke, said: 'Acts of parliament * * * are to be so construed, as no man that is innocent, or free from injury or wrong, be by a literal construction punished or endamaged.' In *United States* v. *Kirby,* 7 Wall. 482, 486, this court said: 'All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter. The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted, "that whoever drew blood in the streets should be punished with the utmost severity," did not extend to the surgeon who opened the vein of a person that fell down in the street in a

> fit. The same common sense accepts the ruling, cited by Plowden, that the statute of 1st Edward II, which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire—"for he is not to be hanged because he would not stay to be burnt." ' And in *United States* v. *Jin Fuey Moy,* 241 U. S. 394, 401, we said: 'A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.' "

The significance attached by this Court to the requirement of *mens rea* is further emphasized by the decision of this Court in *Omaechevarria* v. *Idaho,* 246 U. S., 343. In that case a State criminal statute was attacked on the ground of indefiniteness. The Court, after considering the objection of indefiniteness, said, at page 348:

> "Furthermore, any danger to sheepmen which might otherwise arise from indefiniteness is removed by §6314 of Revised Codes, which provides that: 'In every crime or public offense there must exist a union, or joint operation, of act and intent, or criminal negligence."

From the cases just cited it will be seen that the express requirement in the statute of a criminal intent absolutely disposes of the alleged objection to the statutes on the ground of indefiniteness. But there is another respect in which this statutory requirement disposes of the present suits. "It has been repeatedly held that one who would strike down a state statute as violative of the Federal Constitution must show that he is with-

in the class of persons with respect to whom the act is unconstitutional, and that the alleged unconstitutional feature injures him" (BRANDEIS, J., writing for the unanimous Court in *Heald* v. *The District of Columbia,* 259 U. S., 114, 123; *accord, South Utah Mines* v. *Beaver Co.,* 262 U. S., 325, 331; *Rail & River Coal Co.* v. *Yaple,* 236 U. S., 338; *Hendrick* v. *Maryland,* 235 U. S., 610, 621; *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S., 531, 544-545; *Southern Railway* v. *King,* 217 U. S., 524; and numerous other cases).

By their express terms, the statutes under attack penalize the doing of the acts prohibited only where they are done "with intent to defraud." The only persons who can possibly be injured by these statutes, therefore, and hence, the only persons who, under the cases just cited, have any standing to attack their constitutionality, are persons who do or purpose doing the acts prohibited with intent to defraud. Obviously, the complainants cannot bring themselves within that class; for if they alleged their own intent to defraud, they would be stating themselves out of court. Of course, they allege no such intent on their own part. On the contrary, they go to great lengths in their bills of complaint to make it clear that they have always acted and intend to continue acting in good faith. If it be true that they have always acted and still continue to act in good faith, such good faith will be a complete protection to them against any prosecutions for violation of the statute. The statute expressly requires a criminal intent. There is no allegation that the defendants intend or threaten to prosecute acts not within the statute

as it is written; the presumption is that as public officers they will do their duty and prosecute no acts which are not in contravention of the law (*Heath & Milligan Co.* v. *Worst,* 207 U. S., 338, 359); and if perchance in some isolated instance, a misguided official may prosecute an act which is not prohibited by the law, the parties may safely be left to the protection of the State Courts (*Fox* v. *Walsh,* 236 U. S., 273, 277).

If this argument seems to result in an absurdity, it is only because the appellants' position is in fact absurd. It is absurd because they are seeking equitable relief against a statute which punishes nothing except wilful fraud. And there is another kindred absurdity in the appellants' position. They allege and urge that they have built up a large and profitable business in the sale of kosher meat products. They claim a constitutional right to the undisturbed continuance of that business. The very cornerstone of that business is the belief on the part of the hundreds of thousands of people who patronize it that the word "kosher" has a meaning, and that meat products which are kosher are more desirable and valuable than those which are not kosher. Yet in the very same breath these appellants ask this Court to hold the statutes unconstitutional on the ground that the word kosher is so indefinite as to be unintelligible, and deny the constitutional competency of the Legislature to hold them to the exercise of good faith in making the representation, which they themselves voluntarily make in the furtherance of their own business, that the products sold by them are kosher.

The voluntary designation by the complainants of their products as kosher constitutes a double representation, first, that there is such a thing as a kosher meat product, and, second, that the products sold by the complainants under that designation are kosher meat products. They have no constitutional right to make these representations unless they are true. For the purposes of the present suits, therefore, the appellants are, by their own conduct and representation, estopped from asserting that the word kosher is indefinite or without intelligible meaning.

But if the question of indefiniteness were before the Court, its solution would not be difficult.

The Legislature of the State of New York, and Governor MILLER, after his many years of eminent and honored judicial labors, have considered the statute sufficiently definite to be enacted into law. The New York Courts have said (*People* v. *Atlas*, 183 App. Div., 595, 597; affirmed 230 N. Y., 595):

> "It is manifest, however, that the Legislature did not intend to use the word 'kosher' in an indefinite sense, but evidently in the ordinary sense in which it is used in the trade, which is to designate meat as having been prepared under and of a product sanctioned by said religious requirements, and, therefore, as I view it, the Legislature has itself definitely defined the word 'kosher' as used in the statute."

Circuit Judge MAYER, while serving as Attorney General of New York, said eighteen years ago that the meaning of the phrase "kosher meat" was "well known" (*Opinions of New York Attorney General* [1906], 454-456).

For more than thirty centuries millions of people in every generation have lived and died in the confident belief that there is an ascertainable difference between kosher meat products and non-kosher meat products. Nor has this been a mere belief. It has been a belief on the basis of which they regulated their daily lives, and for which, if need be, they were willing to die. The Legislature of the State of New York has said by its enactment that that belief was not without real basis. Is this Court to say that that belief is a mere illusion, and that the distinction that has been the very foundation of the daily lives of millions of people for thousands of years, and upon the basis of which millions of dollars of capital, including that of the complainants in these suits, have been invested, is without any basis in fact?

The detailed answering affidavits show that excepting in possible border-line cases it is easy to tell whether the requirements as to the slaughter and preparation of kosher meat have been complied with. See especially the affidavit of Moses Hyamson, Rabbi of the Congregation Orach Chaim (Path of Life) of the City of New York; member of the Faculty and Professor of Codes of the Jewish Theological Seminary of America; formerly Senior Judge of the Ecclesiastical Court of London for eleven years, and Acting Chief Rabbi of the British Empire for two years; author of the English Edition of the Collatio Mosaicarum et Romanarum Legum and of "The Oral Law," and LL. D., of London University, especially at folios 44 to 48.

The decisions of this Court show how baseless is the claim of the appellants here that the statutes are void for indefiniteness.

The Wartime Prohibition Law, as interpreted by this Court (*U. S.* v. *Standard Brewery,* 251 U. S., 210), prohibited the sale of intoxicating liquors. It is notorious that the definitions of intoxication by medical and scientific authorities are in hopeless conflict with one another; that a percentage of alcohol which is capable of producing certain toxic effects on one individual may have absolutely no such effects on another individual; and that the effect produced by the same liquor on the same individual may vary widely at different times according to his condition and the manner in which it is imbibed. In spite of these many real uncertainties, which left the fate of the defendant in each case to the opinion of a court and jury as to whether a particular percentage of alcohol rendered a liquor intoxicating, the statute was sustained by this Court (*Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S., 146).

Omaechevarria v. *Idaho,* 246 U. S., 343, involved a penal statute of Idaho prohibiting any person having charge of sheep to permit them to graze on a range previously occupied by cattle, adding this provision:

> "But the priority of possessory right between cattle and sheep owners to any such range is determined by the priority in the usual and customary use of such range, either as a cattle or sheep range."

The Court said, at page 348:

> "SECOND: It is also urged that the Idaho statute, being a criminal one, is so indefinite in its terms as to violate the guarantee by the Fourteenth Amendment of due process of law, since it fails to provide for the ascertainment of the boundaries of a 'range' or for determining what length of time is necessary to constitute a prior occupation a 'usual' one within the meaning of the act. *Men familiar with range conditions and desirous of observing the law will have little difficulty in determining what is prohibited by it.* Similar expressions are common in the criminal statutes of other states. This statute presents no greater uncertainty or difficulty, in application to necessarily varying facts, than has been repeatedly sanctioned by this court. *Nash* v. *United States*, 229 U. S. 373, 377; *Miller* v. *Strahl*, 239 U. S. 426, 434. Furthermore, any danger to sheepmen which might otherwise arise from indefiniteness is removed by §6314 of Revised Codes, which provides that: 'In every crime or public offense there must exist a union, or joint operation, of act and intent, or criminal negligence.'"

In *Miller* v. *Strahl*, 239 U. S., 426, the Court passed on a criminal statute requiring that, in case of fire, a hotel-keeper give notice of the fire to all persons in the hotel, and "do all in his power" to save them from the fire. The statute was attacked as unconstitutional for failing to prescribe any fixed rule of conduct. The Court, however, held the statute sufficiently definite, and overruled the attack on its constitutionality.

Nash v. *U. S.*, 229 U. S., 373, was a prosecution under the Sherman Anti-Trust Law. That law having been held by this Court to prohibit only unreasonable restraint of trade, it was claimed that the statute was thereby rendered too indefinite to be a valid criminal enactment. The Court, however, through Mr. Justice HOLMES, held (p. 378) "that there is no constitutional difficulty in the way of enforcing the criminal part of the act."

Waters-Pierce Oil Co. v. *Texas,* 212 U. S., 86, involved a Texas statute prohibiting contracts "reasonably calculated" to fix and regulate prices, and which "tend" to accomplish those results. The acts were attacked as "so vague, indefinite and uncertain as to deprive them of their constitutionality." The Court overruled this attack, and sustained the constitutionality of the law.

A very striking authority on this point is *Heath & Milligan Co.* v. *Worst,* 207 U. S., 338. In that case, a penal statute of North Dakota prohibited the sale or exposure for sale of any paint containing any ingredient other than pure linseed oil, pure carbonate of lead, oxide of zinc, turpentine, Japan dryer, and pure colors, unless the paint was properly labeled with a label showing the percentage of each ingredient not specified and the name and residence of the manufacturer.

The statute was attacked as unreasonable and also upon the ground that there was no recognized or intelligible meaning of the term "pure colors." The Court said, pages 358-359:

> "The term 'pure colors,' it is alleged, is intended to refer to coloring material used by paint manufacturers in powdered form, and is known in the trade as 'dry colors'; that the term 'pure colors' neither has a def-

inite meaning nor is 'it capable of an exact- or even approximately exact definition'; that some dry colors are regarded as 'pure' and others 'impure' by individual manufacturers, but there is 'nothing approaching a consensus of opinion,' and 'no rational classification on the subject has ever been attempted.' The standard 'applied to dry colors is not purity but efficiency.'

"We regard these criticsims answered by our general discussion, and we have specially noticed them that it may not be thought we have overlooked them. They may emphasize what we have already said as to the possible imperfection of the classification of the statute. IT MUST NOT BE FORGOTTEN, HOWEVER, THAT INACCURACIES OF DEFINITION MAY BE REMOVED IN THE ADMINISTRATION OF THE LAW. And it must be borne in mind that the use of the non-enumerated ingredients is not forbidden nor the advantages of the practical tests and scientific research made by appellants taken away from them. *The sole prohibition of the statute is that those ingredients shall not be used without a specific declaration that they are used—a burden maybe, but irremediable by the courts—maybe, inevitable, in legislation directed against the adulteration of articles or to secure a true representation of their character or composition.*"

See also *Sligh* v. *Kirkwood,* 237 U. S., 52, in which the Court sustained a Florida statute prohibiting the shipment of citrus fruit "unfit for consumption."

Numerous other analogous statutes, which have never been specifically ruled upon by this Court because their constitutionality has never been questioned, will readily occur.

Probably all of the States have statutes prohibiting the publication of obscene literature, and the Federal statutes prohibit the transportation of such literature in the mails. Notoriously, the question of what is obscene depends upon the varying standards of time and place, and judges and juries may differ widely as to what is an obscene book. Yet it has never occurred to anyone to question the constitutionality or validity of these statutes on the ground of uncertainty.

It is safe to say that at least a majority of the States of the Union have statutes prohibiting labor on the Sabbath excepting "works of necessity and charity." Obviously, the phrase "works of necessity and charity" may be given widely varying definitions. No one, however, has ever attacked the validity of the Sunday laws on this account.

The cases cited by counsel for the appellant on the question of indefiniteness are not in point.

The basis of the decision in the *Cohen Grocery* case, 255 U. S., 81, is that "the section forbids no specific or definite act" (p. 89), and that it establishes "no standard whatever" (p. 92). The Court laid a great deal of stress on the fact pointed out in Mr. Guthrie's brief, which is quoted at some length in the footnote of the opinion, that able District Judges, in actually attempting to apply the prohibition of the Lever Act against making any "unreasonable rate or charge" for necessaries of life, had reached widely variant conclusions as to what an unreasonable rate or charge made, some of them basing it on market price at the time of the sale, and some on cost price, etc.

It is hardly necessary to analyze in detail the various state court decisions cited by counsel for the appellants on this point, as this Court is certainly not bound on constitutional questions by the variant decisions of courts of the different States. It is worth while pointing out, however, that the case of *Ex parte Lockett* (179 Cal., 581), upon which counsel lays so much stress, is based upon a specific provision of Section 24 of Article IV of the Constitution of California, requiring all laws to be in the English language. No such provision appears in the Constitution of the State of New York or in the Constitution of the United States. *Ex parte Andrew Jackson* (45 Ark., 158) is cited for the proposition that a statute which provided that it was criminal "to leave a wife and child without the means of support" is unconstitutional for uncertainty. If the case cited so held, we venture to say that it would not be followed by this Court. However, a reference to the case shows that it does not hold any such proposition. At page 162, the Court said:

> "Is it a misdemeanor cognizable at law, to 'leave a wife and child without the means of support'? It is certainly a very unworthy thing to do and worthy of the greatest reprehension, unless justified by necessity. But if it be a crime it must be so at common law. *We have no statute making it such.*"

It has been faintly suggested that the statutes are open to criticism because their effect is to import into the Penal Law of New York a foreign body of law. Clearly this point is not well taken. In the same sense that the enforcement of this law requires taking cognizance of the fact of certain

ritual requirements, perhaps every statute or justiciable question before the Courts requires taking into account the facts of nature, science, art or even institutions. The Federal Courts devote considerable study and attention as bases for adjudications involving immense property rights to such questions as novelty, invention, utility and prior art in the law of patents and of copyright. It has recently been held in New York that a misrepresentation with regard to the law of another State constitutes an actionable fraud (*Bernhan Chemical & Metal Corp.* v. *Ship-A-Hoy,* 200 App. Div., 399, affirmed on this point, 234 N. Y., 563, 605), and this decision is in accordance with the weight of authority in the other States (*Travellers' Protective Association* v. *Smith,* 107 N. E., 283, 287; *Bethell* v. *Bethell,* 92 Ind., 318; *Schneider* v. *Schneider,* 125 Iowa, 1; *Windham* v. *French,* 151 Mass., 547; *Wood* v. *Roeder,* 50 Neb., 476). Statutes in New York and elsewhere declare criminal the obtaining of money or other property by fraud or false pretenses. Under the cases we have just cited, it follows that the obtaining of property by misrepresentation regarding the law of another State will be a crime. A prosecution for that crime would necessarily involve a ruling upon what the law of another State is. Could it be held that for that reason the statute against false pretenses is unconstitutional, or that its enforcement would be unconstitutional in such a case?

It cannot be seriously disputed that in the vast majority of cases it is not only possible but easy to tell whether a particular meat product is kosher

or not. Counsel for the appellants makes much of the supposed difficulty of telling in border-line cases whether a particular product is kosher or not. Of course, almost every statute, including criminal statutes, involves border-line cases, the correct decision of which may be difficult. The authorities we have cited show that the fact that a criminal statute involves such border-line cases does not render it unconstitutional. As a matter of fact, border-line cases in which it is difficult to tell whether a particular product is kosher or not, involve only a minute fraction of the whole number of cases (*Record, fol.* 55). It would be a complete answer to appellants' contention on this phase of the subject, to say that the Legislature might clearly require dealers voluntarily making representations to determine at their peril whether those representations are true or not, even in border-line cases. Indeed, if the contention of complainants' counsel that the term kosher is so indefinite that no intelligible meaning can be assigned to it were true, it would, under the authorities, be clearly competent for the Legislature to say that the use of the term inevitably leads to deception and fraud, and that therefore the exploitation of any food products under that designation is prohibited (*Hebe Co.* v. *Shaw, supra; Hutchinson Ice Cream Co.* v. *Iowa,* 242 U. S., 153; *Purity Extract Co.* v. *Lynch,* 226 U. S., 192; *Silz* v. *Hesterberg,* 211 U. S., 31). But in the statutes at bar, the Legislature has not found that the term is indefinite, but on the contrary has ruled that the term is sufficiently definite to penalize its misuse. And it has not even gone to the extent (to which, as we have seen, it might constitutionally have gone) of requiring representations as to the kosher or nonkosher quality of

meat to be true at the peril of the party making the representation. It has penalized misrepresentations only when they are made "with intent to defraud." If the complainants are genuinely at a loss to determine, in the rare border-line cases that may theoretically arise, whether a particular product is kosher or not, good faith will, under the express terms of the statute, completely protect them. Even if it were true that the statute were indefinite, this feature of it would absolutely dispose of any constitutional objection on the ground of indefiniteness (*Omaechevarria* v. *Idaho,* 246 U. S., 343).

POINT IV.

This Court should not exercise its discretion to strike down the statutes involved in the suits at bar.

We do not question the *jurisdiction* of this Court to entertain the present suits. But the suits are equitable ones. The complainants are invoking the discretion of the chancellor to invalidate the solemn act of the legislative branch of the State government. And there are many circumstances in the case at bar which emphasize the reluctance to grant a temporary injunction against the enforcement of a law on the statute books which this Court feels in every case.

The original law, only incidental changes in which were made by the 1922 amendments, has been on the statute books for nine years. It has been consistently enforced during that period, prosecutions have been instituted under it and convictions obtained, and at least one conviction has been

sustained by the highest Court of the State (*People* v. *Atlas, supra*). The State Courts in those cases have had no difficulty in interpreting and enforcing the statute. The amendments of 1922 were enacted eight months, and took effect over four months before the present suits were instituted. In view of these circumstances, the contention that the statutes irreparably injure the complainants' business can hardly be taken very seriously. Despite the claimed irreparable injury, complaints have taken over a year and a half after the handing down of the decision of the District Court to bring their bill in this Court on for hearing. They have survived the supposed irreparable injury too long to leave any possible ground for belief that the injury done to their business by the statutes was really irreparable.

If the State of New York had enacted a law PROHIBITING *the selling of any meat which was not kosher, there might conceivably be something in complainants' argument. The entire argument on behalf of the complainants overlooks the fact that there is no legal compulsion on the part of the complainant to enter into the kosher meat field at all. The complainants have voluntarily undertaken to sell their products as kosher meat and according to their own allegations have built up a large business on the faith of their customers that the meats which they sell as kosher really are kosher. It is well within the power of the Legislature to provide that if they make this representation, they must be held responsible for its correctness.*

The claim made by the complainants that the statutes are impracticable of enforcement is pecu-

liarly the kind of claim that can best be determined upon a specific record, and not upon a consideration of all of the hypothetical and speculative difficulties which the ingenuity of counsel may conjure up. The complainants have not shown that in any particular instance they have really had actual difficulty in determining whether a product sold by them was kosher or not. At the risk of repetition, we refer the Court again to the numerous cases which hold that in suits of this character, the Court will not consider hypothetical or conjectural difficulties, but will confine itself to the record before it, and rule that the complainants are entitled to equitable relief only if they can show that they have actually suffered from the supposed difficulty of which they complain (*Hendrick* v. *Maryland,* 235 U. S., 610, 621; *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S., 531, and other cases cited *supra,* Point III), and that "the Court must deal with the case in hand and not with imaginary ones" (*Yazoo & Mississippi R. R.* v. *Jackson Vinegar Co.,* 226 U. S., 217, 219).

The language of CARDOZO, J., writing for the unanimous Court of Appeals of New York in the *Matter of State Industrial Commission,* 224 N. Y., 13, 17-18, is peculiarly relevant to the situation at bar:

> "The record now before us supplies a pointed illustration of the need that the judicial function be kept within its ancient bounds. Some of the arguments addressed to us in criticism of the resolution apply to all awards for death benefits; others to awards, made before June, 1916; others to awards where one of the dependents is a

> widow. It is thus conceivable that the proposed resolution may be valid as to some carriers and invalid as to others. We are asked by an omnibus answer to an omnibus question to adjudge the rights of all. That is not the way in which a system of case law develops. We deal with the particular instance; and we wait till it arises."

In the *Atlas* case, the highest Court of New York *was* presented with a definite record from which it was possible to tell in concrete form whether or not there was any merit to the objections urged by the complainant there against the practicability of the statute. The Court of Appeals ruled that there was no merit to those objections. This ruling might have been brought to this Court for review by writ of error. The writ of error was not taken. The parties affected by the statute preferred to ask a ruling on a record allowing free play to the ingenuity and imagination of their counsel. This Court has uniformly held that the solemn enactment of the legislative branch of a sovereign government cannot be so invalidated.

CONCLUSION.

The judgments of the District Court should be affirmed.

Dated, November 10th, 1924.

Respectfully submitted,

SAMUEL H. HOFSTADTER,
Special Deputy Attorney General,
Solicitor for the appellee Carl Sherman, as Attorney General of the State of New York.

H. H. NORDLINGER,
With him on the brief.

Argued by
FELIX C. BENVENGA.

Supreme Court of the United States,

OCTOBER TERM, 1923.

Nos. 403, 404 and 405.

HYGRADE PROVISION CO., INC., E. GREENBAUM CO., INC., and GUCKENHEIMER & HESS, INC.,
Appellants,
against
CARL SHERMAN, as Attorney General of the State of New York, and JOAB H. BANTON, as District Attorney of the County of New York,
Appellees.
No. 403. 104

LEWIS & FOX COMPANY,
Appellant,
against
THE SAME,
Appellees.
No. 404. 105

HARRY SATZ,
Appellant,
against
THE SAME,
Appellees.
No. 405. 106

BRIEF FOR APPELLEE JOAB H. BANTON, as District Attorney, etc.

FELIX C. BENVENGA,
Solicitor for Appellee, Joab H. Banton, as District Attorney, etc.

FELIX C. BENVENGA,
CHARLES HENRY,
Of Counsel.

November, 1924.

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HARRY SATZ, Appellant, *against* THE SAME, Appellees.	No. 405.

BRIEF FOR APPELLEE, JOAB H. BANTON, AS DISTRICT ATTORNEY, &c.

Statement.

These appeals are from decrees and orders of the District Court of the United States for the Southern District of New York, unanimously de-

nying motions for preliminary injunctions and dismissing bills in equity. The Court was constituted of three judges, under the provisions of §266 of the Federal Judicial Code.

Introductory.

The complainants brought the bills in equity to restrain the District Attorney of the County of New York and the Attorney General of the State of New York from enforcing the penal provisions of §435, subd. 4, and §435-a of the Penal Law of the State of New York, upon the ground that the statutes are unconstitutional, in that they: (1) deny the complainants the equal protection of the law; (2) deprive the complainants of liberty or property or rights of property without due process of law; and (3) interfere unwarrantably with interstate commerce.

We contend: (1) that equity should not enjoin the enforcement of the statute, because the complainants have a plain, adequate and complete remedy at law; and (2) assuming that the complainants are without an adequate remedy at law, that the statute is, in all respects, valid and constitutional.

In denying the motions for preliminary injunctions and dismissing the bills, the District Court handed down a well-considered opinion, which will be found at pages 28-33 of Record No. 403, to which opinion we respectfully refer the Court.

We have deemed it unnecessary to offer a more complete statement of the case, but beg leave to refer to the statement in the Attorney General's Brief.

The Statutes Involved.

The statutes against which the injunctions are sought are embodied in the New York Penal Law as §435, subd. 4, and §435-a, and read as follows:

"§435. False labels and misrepresentations in the sale of food products.

A person who, with intent to defraud:

1. * * * * * *

2. * * * * * *

3. * * * * * *

4. Sells or exposes for sale any meat or meat preparation and falsely represents the same to be kosher, or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements; or falsely represents any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon the word 'kosher' in any language; or sells or exposes for sale in the same place of business both kosher and nonkosher meat or meat preparations who fails to indicate on his window signs and all display advertising, in block letters at least four inches in height, 'kosher and nonkosher meat sold here', or who exposes for sale in any window or place of business both kosher and nonkosher meat or meat products, who fails to display over such meat or meat preparation so exposed a sign in block letters at least four inches in height reading 'kosher meat,' or 'nonkosher meat,' as the case may be.

Is guilty of a misdemeanor."

"§435-a. Sale of kosher meat and meat preparations.

A person who, with intent to defraud sells or exposes for sale any meat or meat preparation and falsely represents the same to be kosher, whether such meat or meat preparation be raw or prepared for human consumption, or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements; or falsely represents any food product or the contents of any package or container to be so constituted and prepared by having or permitting to be inscribed thereon the word 'kosher' in any language; or sells or exposes for sale in the same place of business, both kosher and nonkosher meat or meat preparations, either raw or prepared for human consumption, who fails to indicate on his window signs and all display advertising, in block letters at least four inches in height, 'kosher and nonkosher meat sold here;' or who exposes for sale in any show window or place of business both kosher and nonkosher meat or meat preparations, either raw or prepared for human consumption, who fails to display over each kind of meat or meat preparation so exposed a sign in block letters at least four inches in height reading 'kosher meat,' or 'nonkosher meat,' as the case may be, is guilty of a misdemeanor."

Penal Law **§435**, subd. 4, was originally enacted by Chap. 233 of the Laws of 1915, and was amended by Chap. 581 of the Laws of 1922.

Penal Law **§435-a** was enacted by Chap. 580 of the Laws of 1922.

Penal Law **§435**, subd. 4, after its original enactment and prior to the amendment of 1922 was held to be constitutional by the Appellate Divi-

sion of the New York Supreme Court, First Department, and by the New York Court of Appeals (*People* v. *Atlas*, 183 App. Div. 595; 230 N. Y. 629). So far as material, the statute then provided that:

> "A person, who, with intent to defraud, * * * sells or exposes for sale any meat or meat preparation and falsely represents the same to be kosher, or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements; or falsely represents any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed therein the word 'kosher' in any language, is guilty of a misdemeanor."

POINT I.

The complainants have a plain, adequate and complete remedy at law.

It is now well established that, under certain circumstances, the Federal Courts will enjoin the enforcement of an unconstitutional State statute. For a long time, it was doubted whether they had this power; and, even now, though it is established that the power exists, there are certain very considerable and definite limitations upon its exercise.

1. Equity will not enjoin the enforcement of a criminal statute duly enacted by a State, unless: (1) the complainant's property rights will be ir-

reparably damaged by the prospect of a criminal prosecution, whether he be found innocent or guilty, and (2) the statute appears unconstitutional with reasonable certainty.

This Court "has often expressed its reluctance to adjudge a State statute to be in conflict with the Constitution of the State before that question has been considered by the State tribunals—to which it properly belongs—unless the case imperatively demands such a decision" (*Louisville & Nashville R. R. Co.* v. *Garrett*, 231 U. S. 298, 305; citing *Pelton* v. *National Bank*, 101 U. S. 143, 144; *Michigan Central R. R. Co.* v. *Powers*, 201 U. S. 245, 291).

> "Courts are reluctant to interfere with the laws of a state or with the tribunals constituted to enforce them. Doubts will not be resolved against the law, nor the decision of its tribunal prevented or anticipated unless the necessity for either be demonstrated" (*Grand Trunk R. R. Co.* v. *Michigan R. R. Com.*, 231 U. S. 457, 465-466).

In *Ex parte Young* (209 U. S. 123, 166, 167), this Court said:

> "No injunction ought to be granted unless in a case reasonably free from doubt. We think such rule is, and will be followed by all the judges of the Federal courts."

In *Cruikshank* v. *Bidwell* (176 U. S. 73, 80), the Court said:

> "It is settled that the mere fact that a law is unconstitutional does not entitle a party to relief by injunction against the proceedings in compliance therewith but it must

> appear that he has no adequate remedy by the ordinary processes of the law or that the case falls under some recognized head of equity jurisdiction."

In *Cavanaugh* v. *Looney* (248 U. S. 450, 456), this Court said:

> "But no such injunction 'ought to be granted unless in a case reasonably free from doubt,' and when necessary to prevent great and irreparable injury. *Ex parte Young, supra,* 166. The jurisdiction should be exercised only where intervention is essential in order effectually to protect property rights against injuries otherwise irremediable."

The complainant must show that the statute is unconstitutional; that the injunction is essential to the safeguarding of property rights (*Traux* v. *Raich,* 239 U. S. 33, 38); and that a plain, adequate and complete remedy may not be had at law (Judicial Code, §267).

The statute as to adequate remedy "certainly means something; and if only declaratory of what was always the law, it must at least have been intended to emphasize the rule, and to impress it upon the attention of the court" (*Cruikshank* v. *Bidwell,* 176 U. S. 73, 81, quoting *New York Guaranty Co.* v. *Memphis Water Co.,* 107 U. S. 205, 214).

2. It is our contention that the so-called Kosher Meat Laws are constitutional as an exercise of the State's police power; and that, even if they are not, the complainants are not entitled to an injunction, because they have a plain, adequate and complete remedy at law. Should the complain-

ants be indicted, they would be at liberty to test the constitutionality of the statutes by a writ of *habeas corpus*, or by interposing unconstitutionality as a defense to the criminal proceedings. The question whether the statute is a valid exercise of the State's police power is one that can as well be tried and determined in a court of law as in a court of equity. No question of fact would be involved to determine the constitutionality of the statutes. Indeed, it would seem preferable that their validity be determined by a court having power to punish those guilty of violating them rather than by a court of equity.

It would not, perhaps, be beside the point to remind the Court that, for a long time, the remedy by injunction against the enforcement of a State statute was deemed an action against the State itself and, hence, not permissible. There is good reason to believe that the late MR. JUSTICE HARLAN was never dissuaded of this viewpoint (*Fitts* v. *McGhee*, 172 U. S. 516). While we concede that it is no longer open to us to urge this objection to the complainants' bill, nevertheless we do submit such Federal jurisdiction as exists for this purpose is of a delicate character and ought not to be extended beyond necessary protection against indubitable injury to property rights.

The case at bar is clearly distinguishable from *Ex parte Young* (209 U. S. 123). In that case, the State undertook to fix certain rates which a railroad might charge for its services and rendered any charge in excess thereof a separate and distinct crime punishable by heavy and infamous penalty. Even though satisfied that the unconsti-

tutionality of the statutes would be a sufficient and successful defense to a criminal prosecution, the complainants were not at liberty to await that occasion to obtain relief. Assuming the rates established by the statute to have been confiscatory, it was incumbent upon the railroad to abide by those rates or obtain servants who were willing to violate the statutes of their State and risk a long term of penal servitude and an extravagant fine. This Court said:

> "It would not be wonderful if under such circumstances there would not be a crowd of agents offering to disobey the law. The wonder would be that a single agent should be found ready to take the risk."

The Court then went on to show that the question of the guilt of each agent could be adjudicated only by a long and complicated inquiry into the reasonableness of the rates fixed by the State—a task obviously difficult for a jury.

In the case at bar, there are no questions of fact to be considered in connection with the determination of the validity of the statutes, nor any difficulty on the part of the complainants in securing necessary agents because, as we shall show, the statute requires an *intent to defraud* to render one violating it guilty.

Furthermore, no rights of the complainant are endangered by the prospect of prosecution under these statutes. Assuming them to be unconstitutional, no conviction can be had thereunder but by a proof of a defendant's intent to defraud, and the punishment of those found guilty is not enormous within the meaning of the rule laid down in

Ex parte Young (*supra*). A violation of the statutes herein involved is a misdemeanor and the punishment therefor is imprisonment for not more than one year or a fine of not more than $500 (N. Y. Penal Law, §1937).

The case of *Rast* v. *Van Deman* (240 U. S. 342) is directly in point. There, this Court passed upon the validity of a statute of the State of Florida requiring merchants in certain designated classes to pay prescribed license taxes, and providing that any person violating any provision of the statute should, on conviction, be punished by fine not exceeding $1000, or by imprisonment in the County Jail not exceeding six months. In the course of its opinion, this Court said (at p. 368):

> "The contention that the statute intimidates against a contest of its legality by the severity of its penalties and is therefore unconstitutional on that ground within the ruling in *Ex parte Young*, 209 U. S. 123, is not justified."

Inasmuch as the statute attacked in the instant case merely punishes those who misrepresent the quality of the meat they sell with deliberate fraudulent intent, there is no basis for the contention that it intimidates innocent persons from going to trial under it, and is analagous to *Rast* v. *Van Deman* rather than to *Ex parte Young*.

The cases of *Truax* v. *Raich* (219 Fed. 273), and *Marcus Brown Holding Co.* v. *Feldman* (269 Fed. 306), are distinguishable on the above grounds, and also because, under the statutes there assailed, the complainants would not have been a

party to the criminal prosecution expected to be brought thereunder, and would have lost their property rights without opportunity to be heard.

3. The complainants allege that they are selling meat which they honestly and reasonably believe to be kosher, but fear that, under these statutes, they will be prosecuted and convicted because, in some instance, a mistake has been made or the jury has been led so to believe. As we shall show at a later point, the statute plainly requires an intent to defraud. The complainants affect so to misunderstand the provisions of the law as to attribute the same preposterous misunderstanding to the District Attorney and ask protection against the effects of his imaginary error.

If the Court agrees that the statute requires an intent to defraud, then the complainants are demanding an injunction against anticipated unlawful and unauthorized conduct of the District Attorney. We have not found any case where an injunction was granted against a prosecuting officer who, it was alleged, was about to damage the complainant without any warrant of law. In no case has a complainant obtained relief where he had not the grace to admit that he was violating the statute, unconstitutional though it was. The complainants seek protection against a law which they pretend is invalid, but they lack the candor to admit they are violating it, except under a tortured and unnatural construction original with themselves.

We respectfully submit that, if the complainants' bill does not affirmatively show that they

are violating the statute according to the Court's understanding of the latter, then no relief can be given them. Indeed, if they are not guilty of any wrongdoing no relief is necessary, and the ordinary course of criminal procedure will establish their innocence.

The question whether the complainants' understanding of the statute or the District Attorney's understanding of the same is correct concerns the question of the guilt or innocence of the complainants. It has nothing to do with the constitutionality of the statute and it ought to be determined by a tribunal which can punish the complainants, should it be found that, in fact, they have violated the statute, reasonably construed.

4. Two cases which we now discuss make clear the position of the District Attorney on this question.

The case of *Jacob Hoffman Brewing Co.* v. *McElligott* (259 Fed. 525) was an action to enjoin the United States Attorney from enforcing the war-time prohibition act, which the United States Attorney had erroneously supposed to include the complainant's product. The Court declined to grant an injunction against the United States Attorney on the ground that he was misconstruing the statute, because that was really the same question as to whether the complainant was violating it and, hence, could far better be determined in ordinary criminal proceedings. The Court, quoting with approval from *Arbuckle* v. *Blackburn* (113 Fed. 616), said [at p. 625]:

> "We are now dealing with an officer of a state, proceeding under a valid law of the

> state, and whose error lies in wrongfully construing the statute so as to include the complainant's product. To entertain the bill in this aspect would be to subvert the administration of the criminal law, and deny the right of trial by jury, by substituting a court of equity to inquire into the commission of offenses where it would have no jurisdiction to punish the parties if found guilty. It would be the extension of equity jurisdiction to cases where prosecutions in state courts by the state officers are sought to be enjoined, with a view to determining whether they shall be allowed to proceed under valid statutes in the courts of law. We think this an enlargement of the jurisdiction opposed to reason and authority."

JUDGE ROGERS, in The *McElligott* case (*supra*), took pains to write an elaborate opinion, in which he showed how very circumscribed was the jurisdiction of equity to enjoin a criminal prosecution, requiring both an unconstitutional statute and an impending property loss in defending the criminal action.

In *Post Printing & Publishing Co.* v. *Brewster* (246 Fed. 321), the State of Kansas passed some anti-cigarette laws which prohibited even the advertisement of cigarettes. The plaintiff, publishing a paper without the State which circulated within it, sought to restrain the enforcement of the ordinance against it, claiming that did not come within the meaning and intent of the act. As to this contention, the Court said [at p.324]:

> "It is quite probable, this well-meant, even if misguided, legislation is within the constitutional power of the state in the exercise of its reserve police powers; and further,

> if this view of the act be not sound, and the act of printing or publishing a newspaper containing the unlawful and prohibited advertisement of cigarettes is not within the meaning and intent of the act, as is by the plaintiff contended, then I agree with the contention of defendants that they may not be restrained and enjoined from attempting the enforcement of a valid law merely on the ground its prohibitive provisions do not include the plaintiff and its employes, for, in such event, there is abundant time and ample opportunity to establish this fact in defense of the criminal prosecution. *Ex parte Ayers*, 123 U. S. 443; *Fitts* v. *McGhee*, 172 U. S. 516; *Davis Mfg. Co.* v. *Los Angeles*, 189 U. S. 207; *Truax* v. *Raich*, 239 U. S. 33."

We respectfully submit that the complainants have a plain, adequate and complete remedy at law and, therefore, are not entitled to injunctive relief.

POINT II.

The statutes are a proper exercise of the police power of the State.

It would be useless at this late date to attempt to summarize the decisions relating to the police power of the State. There can be no doubt, however, that the prevention of fraud is one of the primary objects to which the exercise of the police power may be directed. Vague and extensive as are the many branches of human conduct to which the State's police power may be extended, the

prevention of fraud, cheating and imposition and the maintenance of good morals among our citizens, are within the most conservative definitions of the police power which could possibly be formulated.

That is the purpose and the obvious purpose of these statutes. They are intended to prevent certain frauds which the Legislature believes threatening to the public, and apply to a class of persons having peculiar facilities for the perpetration of certain impositions.

We think also that it is possible to lay down, as an elementary principle, without entering the field of controversy, that, if the statute is intended to prevent fraud, it is a valid exercise of the police power, provided it tends reasonably to effect that end.

1. There are but two elements to the constitutionality of a statute enacted under the police power: (1) Its object must be one within the police power,—in this case the prevention and punishment of fraud; and (2) its provisions must be reasonably calculated to reach the evil to which the Legislature has addressed itself.

The first of these requirements appears satisfied upon a mere inspection of the statute. The other is hardly less clearly met, as the law simply makes it a crime for a person fraudulently to sell unbranded meat.

The constitutionality of these statutes, in substantially their present form, has been upheld by the Court of Appeals of the State of New York

in *People* v. *Atlas* (230 N. Y. 629; affg. 183 App. Div. 595). The amendments of 1922 are of such a nature that the decision in the *Atlas* case is fully applicable to them.

We are confident that, after this adjudication by the highest court of our State, the Supreme Court will be loath to deny the constitutionality of these statutes.

In *Halter* v. *Nebraska* (205 U. S. 34), it is said [at p. 40]:

> "In our consideration of the questions presented we must not overlook certain principles of constitutional construction, long ago established and steadily adhered to, which preclude a judicial tribunal from holding a legislative enactment, Federal or State, unconstitutional and void, unless it be manifestly so. Another vital principle is that, except as restrained by its own fundamental law, or by the Supreme Law of the Land, a State possesses all legislative power consistent with a republican form of government; therefore, each state, when not thus restrained and so far as this court is concerned, may, by legislation, provide not only for the health, morals and safety of its people but for the common good, as involved in the well-being, peace, happiness and prosperity of the people."

In *Powell* v. *Pennsylvania* (127 U. S. 678), it is said [at p. 683]:

> "It is scarcely necessary to say that if this statute is a legitimate exercise of the police power of the state for the protection of the health of the people, and for the prevention of fraud, it is not inconsistent with

> that amendment; for it is the settled doctrine of this court that, as government is organized for the purpose, among others, of preserving the public health and the public morals, it cannot divest itself of the power to provide for those objects; and that the Fourteenth Amendment was not designed to interfere with the exercise of that power by the States. *Mugler* v. *Kansas,* 123 U. S. 663; *Butchers' Union Co.* v. *Crescent City Co.,* 111 U. S. 746, 751; *Barbier* v. *Connolly,* 113 U. S. 27; *Yick Wo* v. *Hopkins,* 118 U. S. 356."

We will not impose upon the patience of the Court with an elaborate treatise upon the nature and boundaries of the police power. It will suffice to call attention to a few recent decisions upholding State statutes which seem to us to go much further than is necessary in this case. When we regard the holdings in these cases, we are confident that the Court will not render nugatory the act of our Legislature in the present case.

The States have power to enact statutes requiring various products sold therein to be labeled with the exact percentages of the different ingredients composing each.

> *Savage* v. *Jones,* 225 U. S. 501 (animal foodstuffs).
>
> *Corn Products Refg. Co.* v. *Eddy,* 249 U. S. 427 (syrups).
>
> *Sligh* v. *Kirkwood,* 237 U. S. 52 (citrus fruits).
>
> *Hebe Co.* v. *Shaw,* 248 U. S. 297 (condensed milk).

In *Armour & Co.* v. *North Dakota* (240 U. S. 510), a State statute was sustained that forbade

the sale of lard, except in packages containing 1, 3 and 5 pounds, or multiples thereof. The Supreme Court could not say that such a statute was not reasonably directed at a genuine evil. Accordingly, it was held a valid exercise of the State's police power.

In *Hutchinson Ice Cream Co.* v. *Iowa* (242 U. S. 153), State statutes forbidding the sale of ice cream containing less than a prescribed percentage of butterfat were upheld as a valid exercise of the police power.

In *Noble State Bank* v. *Haskell* (219 U. S. 104), it was held a valid exercise of the police power for a State to pass a statute requiring banks to contribute to a fund to make good any loss to depositors upon the failure of a bank.

In *Green* v. *Frazier* (253 U. S. 233), the State of North Dakota levied taxes to raise funds to enable it to go into the business of manufacturing and marketing farm products, establishing warehouses, elevators, flour mills, building homes for residents. These projects were held to be within the police power of the state and not violative of the Federal Constitution.

In *Royal Baking Powder Co.* v. *Emerson* (270 Fed. 429, 435), it was said:

> "It may be added that, where the State law is not in conflict with the national act, a broad latitude is allowed states in protecting their citizens from adulterated or misbranded articles." (Citing *Hebe Co.* v. *Shaw*, 248 U. S. 297; *Corn Products Co.* v. *Eddy*, 249 U. S 427.)

In *Corvallis Creamery Co.* v. *Van Winkle* (274 Fed. 454), the State of Oregon enacted a penal statute rendering it a crime for any concern dealing in a substitute for butter, milk, or cheese to use as a part of its name or the name of its products the words, "milk", "butter", "cream", "cheese", "dairy", etc. The Court refused to enjoin the enforcement of this statute, declaring it a valid exercise of the police power.

In *Adams* v. *Milwaukee* (228 U. S. 572), an ordinance, forbidding milk to be brought into the city, unless from cows which had sustained a certain tuberculin test, was held valid.

2. It is apparent from these authorities and from reflection that a valid police statute need not be, and seldom can be, *entirely* free from the objections that it restrains the liberty of citizens, takes property without due process of law, denies the equal protection of the laws, and interferes somewhat with interstate commerce. The point is that these defects are trivial and slight when compared to the benefits to the public which flow from the statutes.

For example, prior to the passage of the Eighteenth Amendment, States were allowed entirely to prohibit any manufacture of or traffic in intoxicating liquors (*Mugler* v. *Kansas*, 123 U. S. 623; *Boston Beer Co.* v. *Mass.*, 99 U. S. 25; *Foster* v. *Kansas*, 112 U. S. 201). No doubt these statutes impaired, if they did not destroy, the property of those engaged in the manufacture of spirits. They restrained the liberty of such persons and, to that extent, might be considered as denying them the equal protection of the laws.

It was held, however, and subsequent events have given no reason to doubt the wisdom of the holding, that a State might inflict these hardships to a slight degree for a great public benefit to the mass of citizens.

That we contend is the present case. Indeed, the objections to the New York Kosher Meat statutes are much more technical and unsubstantial than those which might fairly have been made in many of the cases we have cited.

3. The denial of the equal protection of the laws is especially strained. The legislature in regulating the conduct of a business, in the exercise of its police power, has a wide discretion with respect to the selection and classification of the business to be regulated. It ought to be assumed, in the absence of clear proof to the contrary, that the Legislature, in adopting the particular classification it did, had information which justified that action. Where the classification is not unreasonable in itself and the law operates equally upon all persons coming within the class selected, the Courts have not been willing to substitute their judgment for that of the Legislature as to the wisdom or justice of the classification made.

The case of *Lindley* v. *Natural Carbonic Gas Co.* (220 U. S. 61), contains some remarks upon this topic which we believe dispose of this point (see pp. 78-79).

In *Adams* v. *Milwaukee* (228 U. S. 572), a distinction between milk produced within and that without the city was sustained as not denying the equal protection of the laws.

In a recent case against these very defendants (*Packard* v. *Banton*, 264 U. S. 140), this Court recognizes as reasonable a distinction between those who operate automobiles for public hire and those who operate them for private use.

In view of these decisions we submit that the Legislature had full power to single out dealers in kosher meat products and declare those dealers should not, with intent to defraud, make any false representations in regard to the kosher character of the products sold or offered for sale by them. The classification is not unreasonable, and those dealers have peculiar opportunities for committing fraud (which, in the opinion of the Legislature, have not, apparently, been neglected), and the statutes operate equally upon all dealers coming within the class singled out by the Legislature for legislation.

4. The objection that the statutes are unconstitutional because they have been enacted in behalf of a limited class of the community—namely, those desiring to buy kosher meat—is entirely without merit.

The statutes are intended to and aptly calculated to protect an unlimited number of purchasers who desire or may desire to buy kosher meat. It makes no difference whether such persons are Gentiles or orthodox Jews. The statutes do not limit the sale of kosher meat to the one or deny it to the other. No one is deprived of the right to sell kosher meat and call it such, but all persons are prohibited from knowingly offering

non-kosher meat for sale as kosher, and thereby perperate a fraud upon the public.

There may be room for an honest difference of opinion as to whether the Legislature should enter this field of activity, but that question was one for the Legislature to determine and its determination cannot be reviewed by the Courts.

5. The objection that the statues are a violation of due process of law merit but brief discussion. The State has the right, by virtue of its police power, to render it criminal for any person to make false representations with intent to defraud in respect to the character of food products offered for sale to the general public. If the profits to certain persons are injured by statutes requiring fair and honest dealing, the reflection is less on the statutes than upon those who sustain such injury. No one can be deprived of his liberty by virtue of these statutes, unless a jury has found beyond a reasonable doubt that he sold products as kosher meat knowing them not to be such. The statutes do, indeed, require dealers to provide themselves with certain signs, thereby putting them to a slight expense. This deprivation of property, however, we deem so trifling as to have no weight, as compared with the important and necessary benefits which the Legislature has attempted to confer upon the public.

We respectfully submit, therefore, that the statutes are a proper exercise of the police power of the State and valid and constitutional.

POINT III.

The statutes require both a definite act and a specific intent to defraud.

A great portion of the complainants' argument is devoted to the contention that the word "kosher" is not adequately defined in the statute, nor in the religious requirements therein referred to. By attempting to disbelieve that an intent to defraud is required and by exaggerating whatever vagueness does, in fact, exist, the complainants have conjured up a picture of innocent, well-meaning persons, with a sincere belief in the kosher quality of the products offered for sale, being ruthlessly jailed merely because of a divergence from the judgment expressed by a jury. In connection with the complainants' insistent claims that no intent to defraud is necessary, this difficulty in definitely establishing the kosher quality of a given product is made to appear somewhat impressive. Upon analysis, however, it is perfectly apparent that an intent to defraud is required by the statute, and it also is apparent that whether certain meat is kosher or not is a question which, with the exception of a negligible number of cases, is fairly easy of determination.

When these two branches of the complainants' argument are considered separately they lose all the persuasiveness which they had when skilfully blended together.

1. Penal Law §435, subd. 4, and Penal Law §435-a are almost identical—a fact which we were

anxious to impress upon the Court when calling attention to the case of *People* v. *Atlas* (*supra*), where the Court of Appeals held the former law constitutional. The substantial similarity of the statutes has given the appellants a chance to argue, or, at least, to assert, that §435-a must have been enacted deliberately to dispense with the necessity for an intent to defraud; otherwise, it is said, the section would be unnecessary and repetitious. We do not feel called upon to demonstrate the similarity or dissimilarity of the statutes in question. That fact is immaterial. The important fact is that an intent to defraud is an element of the offense defined in both Statutes. It is hardly likely that, if the intent of the Legislature in passing §435-a was to abolish, as an element of a certain crime, the intent to defraud, it would have embodied, in the first half dozen words, the phrase "with intent to defraud." Without pursuing the subject further, we feel confident that the Court will not attribute to our Legislature a policy of enacting statutes which mean the precise opposite of what they say.

2. It is the more certain that an intent to defraud is still an element of the crime when it is considered that a contrary interpretation would render the law harsh and oppressive. To that extent, we are glad to agree with the complainants. It is still the law in New York that a penal statute is to be construed, wherever any ambiguity occurs, in favor of the person charged with violating it. This does not mean, of course, that the Court will distort the plain language of the Legislature so as to prevent its application to those for

whom it was intended. As recently as *People* v. *Santoro* (229 N. Y. 277), the Court of Appeals said [at p. 281]:

> "It is always presumed, in regard to a statute, that no unjust or unreasonable effect was intended by the Legislature. The statute, unless the language forbids, must be given an interpretation and application consonant with the presumption."

And in *People* v. *Hewson* (224 N. Y. 136), the Court said [at p. 138]:

> "The statute is penal; its violation is a crime. We may not amplify it by construction" (citing cases).

Referring to the principles we have attempted to state, the Court, in *Gibbs* v. *Arras Brothers* (222 N. Y. 332), said [at p. 335]:

> "By virtue of those rules the statute must be strictly construed for the reasons that it imposes restrictions upon the control or management of private property by the owner and is both penal and criminal. Its effect is not to be extended through implication or analogy."

3. The suggestion is made by the complainants that, inasmuch as the phrase, "with intent to defraud", occurs in the early part of Penal Law §435-a and several semicolons occur thereafter, the phrase does not have any effect, except in that part of the statute prior to the first semicolon.

In other words, the act of selling or exposing any meat falsely represented to be kosher is a crime only in case there exists an intent to de-

fraud. But the other acts mentioned in the statute, such as falsely representing any food product or package to be kosher or selling and exposing kosher and non-kosher meat in the same store without so advertising or exposing such meat in any window or without signs reading kosher or non-kosher, as the case may be, are crimes whether there is any intent to defraud or not.

So to construe the statute attributes to the Legislature an utterly arbitrary and baseless distinction between acts of a similar nature and character having substantially identical effects. No one can suggest any reason whatever for the requirement that a sale must be made with intent to defraud in order to constitute a crime, and yet the mere incorrect representation of the contents of a package is a crime without any intent to defraud. If necessary, no doubt, the Courts would go out of their way to avoid so construing the statute. In this case, however, no violence need be done to the language employed by the Legislature in order to reach this result. It is perfectly apparent that the words "a person who with intent to defraud" should be understood as the subject of each and every verb in the entire section. There is nothing which militates against this construction, except the presence of the semicolons in the sections.

It cannot be doubted, however, that the pronoun "who" is the subject of all the verbs in that section, and as it is immediately followed in the first line with the phrase "with intent to defraud", that phrase must modify all the acts specified by the Legislature.

It is not our desire to ask the Court to disregard any of the ordinary marks of punctuation or to interpret the section otherwise than according to the ordinary rules of syntax. It is not necessary. But, even if it were, there is no doubt that the Court would be justified in doing so, in order to avoid the preposterous construction proclaimed by the complainants.

In *Chicago, etc. R. R. Co.* v. *Voelker* (129 Fed. 522, 527), the Court said:

> "Punctuation is a minor, and not a controlling, element in interpretation, and courts will disregard the punctuation of a statute, or re-punctuate it, if need be, to give effect to what otherwise appears to be its purpose and true meaning." (Citing *Hammock* v. *Loan Trust Co.*, 105 U. S. 77-84; *United States* v. *Lacher*, 134 *id.* 624; *United States* v. *Oregon R. R. Co.*, 164 *id.* 526; *Stephens* v. *Cherokee Nation*, 174 *id.* 445.)

In *Matter of Olmsted* (17 Abb. N. C. 321), the Court, discussing a statute, said:

> "If the semicolon, whose office is to distinguish the conjunct members of a sentence, were dispensed with, and a comma substituted in its place, we should have a clearer conception of the meaning of the sentence (*Matter of Hawley*, 100 N. Y. 206). Courts will, if needful, disregard punctuation in construing statutes."

4. The position assumed by the complainants in contending that the word "kosher" has no definite significance and is so vague as to render it dangerous for them to signify their products as kosher on penalty of imprisonment should they

prove incorrect, we believe largely affected and disingenuous. On the one hand, they claim they will be divested of vast property interests by refraining from continuing to designate the goods which they sell as kosher. On the other hand, the word is so destitute of definite meaning that they honestly cannot find out whether the goods are kosher or not. On the one hand, the word "kosher" has little or no definite meaning. On the other hand, if they are required to label certain of their goods as non-kosher, the goods are thereby stigmatized because "non-kosher" has a definite, unfavorable meaning. We are not able to follow the linguistic psychology by which a certain adjective is meaningless, but the same adjective with a negative prefix is so opprobrious as to entail a great pecuniary loss upon those required to apply it to their goods.

It is difficult to have patience with the attitude assumed by the complainants in this respect. They have built up vast business organizations based upon the desire of a large portion of the citizens to buy kosher meat. When they are required to deal honestly with persons having that perfectly lawful desire, they suddenly discover that there is no such thing as kosher. When they are required to inform prospective purchasers, under certain circumstances, of the non-kosher quality of the products exposed for sale they bewail that their goods are being stigmatized and rendered valueless. If there is anyone who ought to be familiar with the nature and quality of kosher products, it certainly is one who has derived a vast revenue from preparing and market-

ing such products over a term of years on the representation that they are strictly kosher.

No one is required under these statutes to engage or refrain from engaging in the business of purveying kosher products. If any person desires, however, to embark in this business, he must not sell as kosher goods which he knows are not such; and, under certain circumstances, deemed by the Legislature likely to facilitate fraud, he must inform buyers of the non-kosher quality of the goods displayed. Surely, there is nothing in such moderate and reasonable requirements that demands an injunction against their enforcement, in order to prevent hardship too extreme for the ordinary processes of the criminal law.

The Court is confronted with a request that it adjudge words used by the Legislature of the State of New York to be unintelligible as a guide of conduct to the citizens of New York. We respectfully submit that the members of the New York Legislature are much more favorably situated to find out what meaning is given to words by the citizens of that State than this Court. They may be presumed to be in communication with their constituents, to be accustomed to address speeches to them and to hold ordinary conversations in connection with the legislative needs of the people. They must know what words are understood by those whom they represent and what expressions pass current among them. It must be a most extreme case where this Court can confidently pronounce that the Legislature of the State of New York, in describing the elements

of a crime, has used words so vague and indefinite as to render its act null and void.

There is no such difficulty in the instant case.

In *People* v. *Atlas* (*supra*), the Court of Appeals gave no weight to the objection that the statute was too vague to be understood.

5. Affidavits were submitted on behalf of the defendants in the District Court in the case at bar which conclusively discountenance the pretended difficulty of which the complainants complain.

The word "kosher" is to be found in any English dictionary.

In the Encyclopedia Britannica, the editors have clearly and succinctly defined it in a space approximately equal to one page of this brief. It does not appear that the editors of that publication, when they were confronted with the task, gave themselves up to dispair as the complainants profess they will have to do.

There is an affidavit in the record of Moses Hyamson, a very eminent Jewish divine, Professor of Codes of the Jewish Theological Seminary of America, formerly, for eleven years, Chief Judge of the Ecclesiastical and Arbitration Court of London, England, and at one time the Chief Hebrew Ecclesiastical officer of the British Empire and author of various works on Jewish law. This learned man, in an affidavit, sets forth the rules of slaughtering in the space of a very few hundred words—an exposition, we may remark,

not without great interest. He says, near the end of his affidavit:

> "The foregoing is a brief but complete summary of the entire law pertaining to kosher meat and meat preparations."

There is another affidavit by one ELIAS A. COHEN, a prominent Jewish layman of New York, which affidavit sets forth a certain conference of learned Rabbis held on the 29th day of January, 1923. Scores of Rabbis were present at this meeting and their names are duly set forth in the affidavit. The following resolution was unanimously adopted:

> "RESOLVED: That it is the unanimous sense of all those assembled here, representatives of various Rabbinical Colleges and Synods who are interested in the question of kosher, that the Law of Kashruth relative to meat or meat preparations is clear, simple and distinct, and that the laws appertaining thereto are easily ascertainable in the Jewish Code applying thereto."

It thus appears that, at present, there is no doubt among orthodox Jews as to what constitutes kosher. Attempts on the part of the complainants to resuscitate controversy and schisms with reference to this question which occurred during the dark ages are curious rather than useful.

BERNARD DRACHMAN, on whose testimony given in another case the complainants relied in the Court below, swears:

> "That the term kosher is a perfectly clear and definite one in Jewish usage; that the

> questions treated in the Responsa concern only exceptional or border line cases, are in many instances repetitious and constitute only an infinitesimal part of the cases where the law of kosher operates, and that meat and meat products are kosher when prepared in accordance with the settled laws codified in the Rabbinical Code known as Shulchan Aruch."

There are several other affidavits in the record from dignitaries equally high in the orthodox Hebrew church, proving, without exception, the clear, simple and distinct nature of the requirements as to kosher meat.

6. The probability that, in some isolated case, the complainants may make a mistake in judgment and be liable to criminal prosecution therefor, even if true, would not be proof of the unconstitutionality of these statutes. There is ample authority for criminal liability under those circumstances.

In *Nash* v. *United States* (229 U. S. 373), a prosecution under the Sherman Act, MR. JUSTICE HOLMES, writing for the Court, said [at pp. 376-377]:

> "It is said that the crime thus defined by the statute contains in its definition an element of degree as to which estimates may differ, with the result that a man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men. The kindred proposition that 'the criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable; there must be some definite-

> ness and certainty' is cited from the late MR. JUSTICE BREWER sitting in the Circuit Court. (*Tozer* v. *United States*, 52 Fed. Rep. 917, 919.) But apart from the common law as to restraint of trade thus taken up by the statute the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death."

The Court then gave many illustrations and citations sustaining these remarks, utterly discountenancing the contention that a mere error of judgment could not, under the Constitution, amount to a crime.

Other cases have upheld statutes which seem to us substantially less clear and explicit than those with which the Court is now concerned.

It would be useless to attempt to digest all of the authorities to be met with on this subject, but, as we did in considering the extent of the police power, it will suffice merely to mention a few typical instances.

In *Fox* v. *State of Washington* (236 U. S. 273), a state statute was upheld which rendered criminal "encouraging disrespect for law".

In *Ex parte Hayden* (12 Cal. App. 145), a statute was enforced which rendered it criminal for a confidence operator to be found loitering around a wharf, depot, or brokerage office, etc.

In *Comer* v. *United States* (213 Fed. 1), statutes against the mailing of obscene matter were

held valid, in spite of the indefinite standard to be observed.

We respectfully submit, therefore, that the statutes are sufficiently clear and definite, and require both a definite overt act and a specific intent to defraud.

IN CONCLUSION.

The decree and judgment of the District Court, denying the injunctions and dismissing the bills, should be affirmed.

Respectfully submitted,

FELIX C. BENVENGA,
Solicitor for Appellee,
Joab H. Banton,
District Attorney,
New York County.

FELIX C. BENVENGA,
CHARLES HENRY,
Of counsel.

November, 1924.

HYGRADE PROVISION COMPANY, INC., ET AL. *v.* SHERMAN, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, ET AL.

LEWIS & FOX COMPANY *v.* SHERMAN, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, ET AL.

SATZ *v.* SHERMAN, AS ATTORNEY GENERAL OF THE STATE OF NEW YORK, ET AL.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Nos. 104–106. Argued November 20, 21, 1924.—Decided January 5, 1925.

1. Equity will interfere to prevent criminal proceedings under an unconstitutional statute when that is necessary to effectually protect property rights. P. 500.
2. A criminal statute is not lacking in due process of law merely because the application of its prohibition may be uncertain in exceptional cases; and the more clearly so where the act defined is made criminal only when performed with a specific intent to defraud. P. 501.
3. Laws of New York punishing those who sell or expose for sale meat or meat preparations falsely misrepresenting them as "Kosher," or "as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements," or who sell or expose for sale in the same place both Kosher and non-Kosher meat etc., without signs indicating that both kinds are sold and labeling the articles accordingly, do not violate the rights of dealers under the due process and equal protection clauses of the Fourteenth Amendment or infringe the Commerce Clause. Pp. 501, 503.

Affirmed.

APPEALS from decrees of the District Court dismissing the bills in three suits brought by dealers to enjoin the Attorney General of the State of New York and the District Attorney of the County of New York from proceed-

ing against the plaintiffs under chapters 580 and 581, Laws of New York, 1922, respecting the sale of "Kosher" meat and meat preparations.

Mr. David L. Podell, with whom *Mr. Benjamin S. Kirsh* was on the brief, for appellants.

Mr. Samuel H. Hofstadter, with whom *Mr. H. H. Nordlinger* was on the brief, for Sherman, Attorney General, appellee.

Mr. Felix C. Benvenga, with whom *Mr. Charles Henry* was on the brief, for Banton, District Attorney, appellee.

MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

These appeals challenge the constitutionality of cc. 580 and 581, 2 Laws of New York, 1922, pp. 1314–1315, as being in contravention of the due process and equal protection of the law clauses of the Fourteenth Amendment and the commerce clause of the Constitution of the United States. So far as these cases are concerned, the statutes are substantially alike, and it is enough to refer to c. 581 which provides that any person who with intent to defraud: . . . "4. Sells or exposes for sale any meat or meat preparation and falsely represents the same to be kosher, or as having been prepared under and of a product or products sanctioned by the orthodox Hebrew religious requirements; or falsely represents any food product or the contents of any package or container to be so constituted and prepared, by having or permitting to be inscribed thereon the word 'kosher' in any language; or sells or exposes for sale in the same place of business both kosher and nonkosher meat or meat preparations who fails to indicate on his window signs and all display advertising, in block letters at least four inches in height, 'kosher and nonkosher meat sold here;' or who exposes for sale in any show window or place of business

both kosher and nonkosher meat or meat products who fails to display over such meat or meat preparation so exposed a sign in block letters at least four inches in height reading 'kosher meat,' or 'nonkosher meat,' as the case may be," is guilty of a misdemeanor.

Separate suits were brought against appellees to enjoin them from proceeding against appellants for any alleged failure to comply with the foregoing statutory requirements or from making any threats of prosecuting or from conducting any prosecutions by reason of any failure to label any of the meats sold as "not kosher" or otherwise interfering with or seeking to prevent the full, free and unhampered sale of their products without labeling, etc., and from injuring their business "by compelling it to be discredited in standing and reputation, and by having its merchandise wrongfully branded as 'nonkosher,' in accordance with the requirements of said enactments."

The several bills allege that appellees "have threatened to prosecute all complaints against persons or concerns engaged as manufacturers, dealers, retailers, or otherwise in the sale of raw or prepared meat commodities, who are charged with violating the statutes;" that by reason of these threats and of the fear inspired by the requirements of the statutes, when called upon at their peril to determine whether their products are kosher and label the same, appellants have decided and will continue to decide that all products sold by them are not kosher; that such determination has been and will be induced by the fear that some judge or jury might determine that the Rabbinical law or the customs, traditions and precedents of the orthodox Hebrew religious requirements necessitate that even such meats as appellants sell as kosher are not kosher. The bills contain allegations tending to show the impossibility or, at least, the great difficulty of determining with certainty what is kosher according to the Rabbinical law and the customs, traditions and precedents

of the orthodox Hebrew religious requirements; but appellants allege that whenever they could possibly determine in advance whether any meat commodity in their honest belief might be called kosher, they have sold the same as kosher, but not otherwise. The bills aver that irreparable injury to appellants' business, property, good will and reputation will result. It does not appear that any of the appellants has ever been prosecuted for a violation of the statutes or has ever been specifically threatened with prosecution, the threats alleged being, in substance, simply that all violators of the statutes will be prosecuted. The District Court, in each case, after a hearing upon an order to show cause why a preliminary injunction should not issue, upheld the statutes, denied the injunction and dismissed the bill.

The general rule is that equity will not interfere to prevent the enforcement of a criminal statute even though unconstitutional. *Packard* v. *Banton*, 264 U. S. 140, 143; *In re Sawyer*, 124 U. S. 200, 209–211; *Davis & Farnum Manufacturing Co.* v. *Los Angeles*, 189 U. S. 207, 217. But appellants seek to bring themselves within an exception to this general rule, namely, that a court of equity will interfere to prevent criminal prosecutions under an unconstitutional statute when that is necessary to effectually protect property rights. *Packard* v. *Banton*, *supra*; *Terrace* v. *Thompson*, 263 U. S. 197, 214. That these bills disclose such a case of threatened actual and imminent injury as to come within the exception is not beyond doubt. But upon a liberal view of the decisions above cited and other decisions of this Court (see *Kennington* v. *Palmer*, 255 U. S. 100, and cases referred to in footnote), we accept the conclusion of the lower court, based on the decisions of this Court, that if the statutes under review are unconstitutional appellants are entitled to equitable relief; and pass to a consideration of the constitutional questions.

1. The specific complaint is that the word "kosher" and the phrase "orthodox Hebrew religious requirements" are so indefinite and uncertain as to cause the statutes to be unconstitutional for want of any ascertainable standard of guilt. It is in support of this assumption that appellants allege they are unable to determine with any degree of certainty whether a particular meat product is kosher, and, when called upon, at their peril, to make a determination and label the product accordingly, they have decided and will continue to decide that all of the products sold by them are nonkosher. But obviously the statutes put no such burden upon them, since they expressly require that any representation that a product is kosher must not only be false but made with intent to defraud. The Appellate Division of the Supreme Court of New York, upholding the validity of a statute substantially the same as those now under review, in *People* v. *Atlas*, 183 App. Div. 595, 596–597, thus characterized it:

"The purpose of the statute, manifestly, is to prevent and punish fraud in the sale of meats or meat preparation, and it only operates on those who knowingly violate its provisions, for it is expressly provided that there must be both an intent to defraud and a false representation."

It thus appears that, whatever difficulty there may be in reaching a correct determination as to whether a given product is kosher, appellants are unduly apprehensive of the effect upon them and their business, of a wrong conclusion in that respect, since they are not required to act at their peril but only to exercise their judgment in good faith, in order to avoid coming into conflict with the statutes. Indeed, putting the statutes aside, such judgment they would be bound to exercise upon ordinary principles of fair dealing. By engaging in the business of selling kosher products they in effect assert an honest purpose to distinguish to the best of their judgment between

what is and what is not kosher. The statutes require no more. Furthermore, the evidence, while conflicting, warrants the conclusion that the term "kosher" has a meaning well enough defined to enable one engaged in the trade to correctly apply it, at least as a general thing. If exceptional cases may sometimes arise where opinions might differ, that is no more than is likely to occur, and does occur, in respect of many criminal statutes either upheld against attack or never assailed as indefinite. In *Nash* v. *United States*, 229 U. S. 373, 376–7, this Court had before it a similar contention in respect of the Anti-Trust Act and disposed of it as follows:

"And thereupon it is said that the crime thus defined by the statute contains in its definition an element of degree as to which estimates may differ, with the result that a man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men. . . .

"But apart from the common law as to restraint of trade thus taken up by the statute the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death."

See also, *Waters-Pierce Oil Co.* v. *Texas* (No. 1), 212 U. S. 86, 109; *Miller* v. *Strahl*, 239 U. S. 426, 434; *Sligh* v. *Kirkwood*, 237 U. S. 52; *Coomer* v. *United States*, 213 Fed. 1, 5. Many illustrations will readily occur to the mind, as for example statutes prohibiting the sale of intoxicating liquors and statutes prohibiting the transmission through the mail of obscene literature, neither of which have been found to be fatally indefinite because in some instances opinions differ in respect of what falls within their terms. Moreover, as already suggested, since the statutes require a specific intent to de-

fraud in order to encounter their prohibitions, the hazard of prosecution which appellants fear loses whatever substantial foundation it might have in the absence of such a requirement. *Omaechevarria* v. *Idaho*, 246 U. S. 343, 348.

2. Lewis & Fox Co. is a Massachusetts corporation conducting a general provision supply business including the shipment and sale of original packages into and within the State of New York. It is this situation which forms the basis of the contention that the commerce clause is violated. It is enough to say that the statutes now assailed are not aimed at interstate commerce, do not impose a direct burden upon such commerce, make no discrimination against it, are fairly within the range of the police power of the State, bear a reasonable relation to the legitimate purpose of the enactments, and do not conflict with any congressional legislation. Under these circumstances they are not invalid because they may incidentally affect interstate commerce. *Sligh* v. *Kirkwood*, 237 U. S. 52, 60–61; *Savage* v. *Jones*, 225 U. S. 501, 524–526.

Affirmed.

MR. JUSTICE BRANDEIS took no part in the consideration of this case.